89-568

No.

In the Supreme Court of the United States

OCTOBER TERM, 1989

CHRYSLER CORPORATION, ET AL.,
PETITIONERS

v.

STANLEY SMOLAREK AND RALPH FLEMING,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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90 pp

QUESTION PRESENTED

Whether Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, preempts a state-law handicap discrimination claim based on an employer's alleged refusal to accommodate an employee's handicap where such accommodation is required only by a collective bargaining agreement, not by state law, and would require interpretation of the agreement.

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

In addition to parties named in the caption, Louis Eovaldi and Lyndon Verlyndon were appellees in the court of appeals and are petitioners in this Court. A list of petitioner Chrysler Corporation's subsidiaries (other than wholly-owned subsidiaries) and affiliate corporations is set forth at App. F, *infra,* 53a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Chrysler Corporation, Louis Eovaldi, and Lyndon Verlyndon petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals sitting *en banc* (App. A, *infra*, 1a-27a) is reported at 879 F.2d 1326. The order granting rehearing *en banc* and vacating the panel opinion (App. B, *infra*, 28a) is reported at 866 F.2d 838. The vacated panel opinion of the court of appeals (App. C, *infra*, 29a-41a) is reported at 858 F.2d 1165. The orders of the district court in *Smolarek* v. *Chrysler Corporation* (App. D, *infra*, 42a-47a) are unreported. The opinion and order of the district court in *Fleming* v. *Chrysler Corporation* (App. E, *infra*, 48a-52a) is reported at 659 F. Supp. 392.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1989 (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), provides:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties * * *.

Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. §173(d), provides in pertinent part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

Section 103(b)(i) of the Michigan Handicapper's Civil Rights Act, MCL 37.1103(b)(i); MSA §3.550(103)(b)(i), provides:

> "Handicap" means a determinable physical or mental characteristic of an individual * * * which characteristic * * * is unrelated to the individual's ability to perform the duties of a particular job or position, or is unrelated to the individual's qualifications for employment or promotion.

Sections 202(1)(b) and (c) of the Michigan Handicapper's Civil Rights Act, MCL 37.1202(1)(b) and (c); MSA §3.550 (202)(1)(b) and (c), provide that "[a]n employer shall not":

> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is

unrelated to the individual's ability to perform the duties of a particular job or position.

(c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

STATEMENT

Respondents Stanley Smolarek and Ralph Fleming allege in these cases that petitioner Chrysler Corporation refused to reinstate them to their hourly positions following disability absences. Their employment with Chrysler was governed by a collective bargaining agreement between Chrysler and respondents' exclusive bargaining representative, the United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW").

Both respondents suffer from medical conditions that required accommodation in their work activities (App., *infra*, 21a, 22a). The Chrysler-UAW collective bargaining agreement gives employees specific rights to handicap accommodation, including (1) the right to medical or disability leave if they develop a temporarily disabling medical condition; (2) the right to return to work after a disability, in accordance with seniority and certain procedures, including passing a medical examination; and (3) the right to "reasonable accommodation[] to an employee's handicap" including "place[ment] in accordance with his seniority, on job in his department or division that he can perform consistent with his assigned physical restrictions" (Fleming C.A. App. 101). The agreement also provides an elaborate grievance arbitration procedure for the resolution of disputes (Smolarek C.A. App. 91-97).

Respondents claim that Chrysler violated the Michigan Handicapper's Civil Rights Act ("HCRA") by failing to provide

the accommodation granted by the collective bargaining agreement. The trial courts found these HCRA claims preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. §185. However, in an 8-7 *en banc* decision, the Sixth Circuit reversed.

Because respondents' HCRA claims are based on rights created solely by the Chrysler-UAW collective bargaining agreement, and not by state law, and because their claims would require interpretation of the collective bargaining agreement, they are preempted by Section 301. Any other result would conflict with federal labor policy requiring that labor disputes be resolved in accordance with uniform federal laws and would contravene the federal policy favoring resolution of collective bargaining disputes through arbitration.

1. *Smolarek's Claim.* Respondent Smolarek was a tool-and-die maker at Chrysler who, since 1955, was provided with accommodation of certain medical restrictions stemming from a seizure disorder (App., *infra*, 2a, 21a). In October 1984 Smolarek suffered a seizure at work and was disabled for two weeks (*id.* at 2a), during which time he was provided with a medical leave pursuant to the Chrysler-UAW collective bargaining agreement. Smolarek alleges that when he was released to return to work, he was told there was no work available consistent with his medical restrictions (*id.* at 3a).

Smolarek instituted this action in Michigan state court in 1986, claiming he had been denied reinstatement following a disability leave, and that this violated the HCRA. In particular, Smolarek alleged that he became "disabled * * * for approximately two weeks," that he thereafter reported back to work subject to certain medical restrictions, but that Chrysler

> * * * has refused to return plaintiff to his former position or another position consistent with his medical restrictions and has maintained plaintiff instead on disability lay-off indefinitely (Smolarek C.A. App. 5-6).

Chrysler removed Smolarek's suit to federal court on the basis that his claim that Chrysler was required to accommodate his medical restrictions actually arose under the Chrysler-UAW collective bargaining agreement and was preempted by federal law under Section 301. The district court denied Smolarek's motion to remand, finding that Smolarek's purported HCRA claim was preempted by Section 301 under this Court's decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985) (App., *infra*, 42a). Smolarek then stipulated to dismissal of his action for failure to exhaust contractual remedies (*id.* at 47a), and filed an appeal from the district court's decision denying his motion to remand.

2. *Fleming's Claim.* Fleming began work for Chrysler as a painter-glazer in 1976 (App., *infra*, 3a). As a result of an automobile accident in 1983, Fleming suffered "severe and permanent injuries" which, after he returned to work from a year-long disability leave, required medical restrictions on his activities as a painter-glazer (Fleming C.A. App. 12, 209). In 1984 Fleming allegedly was reinjured while leaving the Chrysler plant and was off work for ten days (Fleming C.A. App. 186). Fleming alleges that after his return from this disability he was given work assignments that were inconsistent with his medical restrictions (App., *infra*, 4a). Fleming was eventually laid off indefinitely due to lack of work, but he claims he was told he would not be recalled (*id.*).

Fleming filed an action in Michigan state court in 1985, claiming that he suffered from "severe and permanent injuries" which required "certain restrictions" on his work activities (Fleming C.A. App. 12). Fleming alleged that "instead of abiding by said restrictions, [he] was subsequently terminated" (*id.*). Fleming's complaint asserted four causes of action: (1) violation of the Michigan HCRA; (2) retaliatory discharge for intent to file a worker's compensation claim; (3) breach of an implied duty of good faith and fair dealing; and (4) intentional interference with the pursuit of his occupation (*id.*).

Chrysler removed the action to federal court on Section 301 preemption grounds. The district court denied Fleming's motion to remand for the reason that at least the claims for breach of good faith and fair dealing and interference with the pursuit of his occupation were preempted by Section 301. Fleming did not appeal the denial of his motion to remand.[1] Thereafter Fleming's deposition was taken in which he admitted he could not perform his job as a painter-glazer without "provisions" being made for his medical condition, and he claimed that Chrysler had a duty to make such "provisions" under the collective bargaining agreement (App., *infra,* 22a). Chrysler then filed a motion for summary judgment asserting that Fleming's HCRA and retaliatory discharge claims, like his other two claims, were preempted by Section 301 and subject to dismissal for failure to exhaust contractual remedies. The district court granted the motion and dismissed Fleming's entire complaint (*id.* at 48a, 52a). Fleming appealed only from the dismissal of his HCRA and retaliatory discharge claims.

3. *The Michigan Handicapper's Civil Rights Act.* The HCRA prohibits discrimination in employment on account of a "handicap," which is defined as a "determinable physical or mental characteristic" that "is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1103(b)(i) and 37.1202(1)(b), (c). In light of this definition, the Michigan Supreme Court has held that physical conditions that are "job related," and which therefore require "accommodation," are not "handicaps" subject to the protection of the HCRA. *Carr* v. *General Motors Corp., 425 Mich.* 313, 389 N.W. 2d 686 (1986).[2] It is thus beyond dispute that any right to

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[1] Thus, as the court of appeals recognized (App., *infra,* 15a), while Smolarek has preserved his challenge to the removal of his action under Section 301, Fleming has conceded the propriety of the removal and the existence of federal jurisdiction under Section 301.

[2] Following *Carr,* the Michigan Court of Appeals has held in three cases that labor contract-based handicap accommodation claims, like respondents' here, are preempted by Section 301. *Desjardins* v. *The Budd Company,* 175 Mich. App. 599, 438 N.W.2d 622 (1988); *Metro* v. *Ford Motor Company,* 169

accommodation arises from the Chrysler-UAW collective bargaining agreement, and not the Michigan HCRA.

4. *The Sixth Circuit Decision.* A three-judge panel of the Sixth Circuit issued an opinion on October 3, 1988, holding that Smolarek's and Fleming's HCRA claims were not preempted by Section 301 (App., *infra*, 29a-41a). On Chrysler's motion for rehearing *en banc*, the panel decision was vacated and the case was reheard by the entire bench of fifteen judges (App., *infra*, 28a). The *en banc* court ruled on July 12, 1989 (App., *infra*, 1a-27a).[3] A bare majority — eight of the fifteen judges — held that respondents' HCRA claims were not preempted. The seven dissenting judges believed respondents' HCRA claims were preempted, inasmuch as they arose *only* from the collective bargaining agreement, with the result that respondents were attempting to "bootstrap" negotiable contract rights into purported nonnegotiable HCRA claims (App., *infra*, 25a).

a. *The Majority Opinion.* The eight-judge majority opinion, written by Judge Wellford, acknowledged that these cases "present close and difficult questions" regarding the scope of Section 301 preemption (App., *infra*, 2a), but then proceeded to state the broad view that "§301 does not preempt state anti-discrimination laws" (*id.* at 11a), ostensibly based on *dictum* in *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. ___, 108 S.Ct. 1877, 1885, 100 L.Ed.2d 410 (1988). The opinion did not address this Court's

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Mich. App. 549, 426 N.W.2d 700 (1988); *Cuffe* v. *General Motors Corp.*, 166 Mich. App. 766, 420 N.W.2d 874 (1988). An application for leave to appeal to the Michigan Supreme Court is presently pending in *Desjardins*. The Michigan Court of Appeals' decisions in *Metro* and *Cuffe* were vacated by the Michigan Supreme Court and remanded to the Court of Appeals for reconsideration in light of *Lingle*. 437 N.W.2d 634 (Mich. 1989). The Court of Appeals thereafter reaffirmed its Section 301 preemption holding in *Metro*, ___ N.W.2d ___ (Mich. App. Aug. 25, 1989), and the plaintiff has re-applied for leave to appeal to the Michigan Supreme Court. The Michigan Court of Appeals has not yet issued a decision on reconsideration in *Cuffe*.

[3] All fifteen judges agreed that, in light of this Court's decision in *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. ___, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988), Fleming's retaliatory discharge claim was not preempted by Section 301. Chrysler does not seek review of that decision.

explanation in *Lingle* that "the operation of the anti-discrimination laws does, however, illustrate the relevant point for pre-emption analysis": whether "the existence or the contours of the state law violation [is] dependent upon the terms of the [labor] contract." *Id.*

Though the majority identified the specific allegations establishing that respondents sought accommodation for their medical conditions (App., *infra,* 11a, 15a), and noted that such accommodation would exceed rights or duties created by the HCRA (*id.* at 11a), it dismissed the fact that respondents' accommodation claims were rooted in the collective bargaining agreement. The majority instead concluded that the contract provisions merely constituted a "defense" to the HCRA claims, see *Caterpillar Inc.* v. *Williams,* 482 U.S. 386 (1987), and that, in any event, respondents' counsel had during oral argument "expressly disclaimed that they seek any collective bargaining agreement remedy" (App., *infra,* 13a-14a).

Lastly, the majority held that even though accommodation rights and procedures were governed by the collective bargaining agreement, resolution of respondents' HCRA discrimination claims simply turned on Chrysler's "motivation" — an inquiry deemed "independent" of the labor agreement under *Lingle* (*id.* at 15a).

b. *The Dissenting Opinion.* Seven judges dissented in an opinion by Judge Kennedy. After analyzing the specific allegations in respondents' complaints, the dissenting judges concluded that "Smolarek's claim is preempted to the extent that he claims a right to reinstatement to a position other than his former job" and that "Fleming's claim is preempted to the extent that he claims a right [to accommodation exceeding that provided by the HCRA] to enable him to perform his job" (App., *infra,* 19a).

Noting that "the question of whether removal jurisdiction exists based upon a federal question is answered by reviewing the complaint as of the time of removal," the dissenters found counsels' disclaimer at oral argument ineffectual: "The com-

plaints and the substance of [respondents'] claims do present a §301 federal question" because "[t]here is no right independent of the collective bargaining agreement to be reinstated to another job consistent with one's medical disability under the HCRA," citing *Carr* v. *General Motors Corp., supra* (App., *infra,* 20a-21a). Respondents' claims therefore arose from or were "inextricably intertwined with" the contract (*id.* at 22a).

Explaining that respondents were "ask[ing] us to wear blinders" by "simply asserting that [they have] a state-law tort claim" independent of the contract, Judge Kennedy's opinion observed that this Court had rejected that very view in *Electrical Workers* v. *Hechler,* 481 U.S. 851 (1987). The dissenters also rejected respondents' (and the majority's) over-generalization regarding non-preemption of state-law discrimination claims. While some claims (e.g., race, sex, and age discrimination) may "fall under the doctrine of complete parallelism, as explained * * * in *Lingle,*" the right to be free of such forms of discrimination "is independent of any ancillary right contained in a collective bargaining agreement" (App., *infra,* 24a). But in the present setting, the dissenters concluded, accommodation of a medical condition is a *negotiable* right provided only by contract which cannot be "bootstrap[ped]" into an HCRA claim without triggering Section 301 preemption (*id.* at 25a).

Finally, the seven dissenters warned of the majority's "overbroad precedent against finding §301 preemption" which would "permit[] an individual to sidestep available grievance procedures[,] * * * cause arbitration to lose most of its effectiveness, [and] eviscerate a central tenet of federal labor contract law under §301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lingle,* 108 S.Ct. at 1884; *Lueck,* 471 U.S. at 220.

REASONS FOR GRANTING THE PETITION

Over the past several decades this Court has repeatedly held that disputes between employers and employees directly relating

to the terms and conditions set forth in their collectively bargained labor contracts must be governed by a uniform body of federal law, with resolution of such disputes through contractual grievance arbitration procedures rather than judicial litigation. The court of appeals' 8-7 *en banc* decision, however, permits respondents and countless similarly situated employees to challenge their employers' actions concerning matters governed by a collective bargaining agreement in court simply by labeling their contract dispute as a "discrimination" claim and eschewing the grievance procedure set forth in that agreement.[4]

The court of appeals' *en banc* ruling thus conflicts with federal labor policy mandating that labor disputes be resolved in accordance with uniform federal laws and pursuant to grievance arbitration procedures. The court of appeals' decision cannot be squared with this Court's decisions in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985); *Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987), or *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. ___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). The court of appeals reasoned that respondents' claims in this case more closely resembled the claim in *Lingle* than that in *Lueck*. That is not so. In actuality, as the dissenters concluded, respondents' claims are *directly* founded on the collectively bargained right to accommodation of a medical condition, and fit precisely within this Court's statement in *Lingle* that a state-created remedy, "although nonnegotiable," is preempted by Section 301 if it "turn[s] on the interpretation of a collective-bargaining agreement for its application." 108 S.Ct. at 1882 n.7. Respondents' claims are, indeed, archetypal examples of state-created "discrim-

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[4] Forty-five states and the District of Columbia have enacted statutes prohibiting handicap discrimination. See Note, *Employee Drug Testing*, 74 Va. L. Rev. 969, 986 n.112 (1988). At least ten of these statutes, like Michigan's, do not require accommodation of job-related handicaps. See Ind. Code § 22-9-1-13 (1971); Neb. Rev. Stat. § 48.1101 *et seq*; Ga. Code Ann. § 66-504 (1979); Kan. Stat. Ann § 44-10 (1986); Ky. Rev. Stat. Ann. § 207.130 (1976); N.H. Rev. Stat. Ann. § 354-A (1977); S.D. Laws §20-B-1 *et seq.* (1986); S.C. Code Ann. § 43-33-60 (1983); Tex. Hum. Res. Code Ann. §121.003 (Vernon 1980); Nev. Rev. Stat. § 613.310 *et seq.* (1987).

ination" theories that must be held preempted because their resolution requires contract interpretation.

The lower courts have struggled with the proper application of *Lueck* and *Lingle* in similar cases involving a variety of state-law theories. The 8-7 split of the *en banc* Sixth Circuit in this case demonstrates the confusion in this area and the need for guidance from this Court, as does the 4-3 split of the Wisconsin Supreme Court on a similar Section 301 preemption issue in *IAM Local 437* v. *United States Can Co.*, 441 N.W.2d 710 (Wisc. 1989). This confusion has resulted in fundamentally different approaches to Section 301 preemption analysis, producing conflicting results in comparable cases and adding uncertainty to an area of the law that demands predictability and uniformity. Moreover, as we will demonstrate at pages 25-28, *infra*, the court of appeals' decision is at odds with the approach taken on the issue of Section 301 preemption by the Seventh and Eighth Circuits. Further review of this question is plainly warranted.

A. The Court of Appeals Has Decided An Important Federal Question In A Way That Cannot Be Reconciled With This Court's Decisions And That Threatens To Disrupt Federal Labor Relations Policy.

1. Federal law and policy preempt state claims that are rooted in or purport to define the meaning of collectively bargained terms and conditions of employment.

There is no dispute in this case that (1) respondents are bargaining unit employees whose employment is governed by the Chrysler-UAW collective bargaining agreement; (2) the labor agreement grants certain rights to return to work following medical disabilities, and prescribes procedures governing the return to work, which are not contained in the Michigan HCRA; (3) respondents were entitled to present their claims of denied accommodation pursuant to the labor contract's grievance arbitration procedure; and (4) respondents have instead presented these claims in state-law "handicap discrimination" actions. Respon-

dents thus seek to have their accommodation claims adjudicated by a court and jury under rules of Michigan law, rather than under uniform rules of federal labor law.

In these circumstances, however, federal labor law supersedes any state cause of action. The contrary decision of the court of appeals cannot be reconciled with the rulings of this Court or with the principles of federal labor policy reflected in those rulings.

Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), creates federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * *." In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), this Court held that Section 301 is not merely a jurisdictional statute but rather it "expresses a federal policy that federal courts should enforce these [collective bargaining] agreements" and that "the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 455, 456. Accordingly, in defining rights and responsibilities in the labor context, "[f]ederal interpretation of the federal law will govern, not state law." *Id.* at 457.

The Court examined the reason for this rule in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962). "The dimensions of §301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills*, requiring issues raised in suits of a kind covered by §301 to be decided according to the precepts of federal labor policy." *Id.* at 103. Disputes over the meaning of a collective bargaining agreement therefore cannot be left to state law because "the subject matter of §301(a) 'is peculiarly one that calls for uniform law.' " *Id.* As the Court further explained:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult * * *. *Id.*

In short, "in enacting §301, Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour*, 369 U.S. at 104. Indeed, the "pre-emptive force of §301 is so powerful as to displace entirely *any* state cause of action" that contends, explicitly or implicitly, that an employer breached its obligations under a labor contract. *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (emphasis added). "[A]ny complaint that comes within the scope of the federal cause of action" — even though "pleaded [as] an adequate claim for relief under * * * state law" and even though seeking "a remedy available *only* under state law" — is "purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of §301." *Id.* at 23-24. See also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 55-56 (1987).

In the last five years this Court has issued a series of opinions that have applied these principles of federal labor policy to a variety of state-law claims. First, in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), an employee brought a tort suit in Wisconsin state court, contending that his employer had "intentionally, contemptuously, and repeatedly failed" to make disability insurance payments under a collectively bargained disability plan. *Id.* at 206. The Wisconsin Supreme Court rejected the employer's argument that federal law preempted the employee's state-law claim, asserting that the employee's suit did not arise under Section 301 because "[u]nder Wisconsin law, the tort of bad faith is distinguishable from a bad-faith breach of contract" and "is independent of that contract." *Id.* at 207. The Wisconsin court additionally held that "[p]ermitting the state action to

proceed would not have an adverse impact on the effective administration of national labor policy, since the courts will make no determination as to whether the labor agreement has been breached." *Id.* at 207-208.

This Court unanimously reversed, explicitly rejecting the notion — accepted by the court of appeals here — that the addition of a motivational factor (e.g., bad faith) to a contract-based claim avoided preemption under Section 301. *Id.* at 211. The Court held that the employee's state-law tort suit was preempted by Section 301 because "any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 218. The Court observed:

> If the policies that animate § 301 are to be given their proper range, * * * the pre-emptive effect of §301 must extend beyond suits alleging contract violations. These policies require that "the relationships created by [a collective bargaining] agreement" be defined by application of "an evolving federal common law grounded in national labor policy." * * * The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. *Id.* at 210-211.

The Court further noted that "[a]ny other result would elevate form over substance and allow parties to evade the requirements of §301 by relabeling their contract claims" as claims under state law. *Id.* at 211.

The Court in *Lueck* recognized that, if state law were allowed to determine the meaning of collectively bargained con-

tract language, "all the evils addressed in *Lucas Flour* would recur" (*id.*):

> The parties would be uncertain as to what they were binding themselves to when they agreed to create a right * * *. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate.

Importantly, the Court reasoned that preempting Lueck's tort claim was the *only* result that "preserves the central role of arbitration in our 'system of industrial self-government.' " *Id.* at 219, citing *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). The Court cautioned that "[p]erhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement." *Id.* at 219. The Court concluded:

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 653 (1965), as well as eviscerate a central tenet of federal labor-contract law under §301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance. *Id.* at 220.

With these conceptual underpinnings, the Court in *Lueck* fashioned a test governing Section 301 preemption that

> when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a §301 claim, * * * or dismissed as preempted by federal labor-contract law. *Id.* at 220.

This Court next addressed these Section 301 policy issues in *Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987). In that case an injured bargaining unit employee sued her union under a state-law tort theory, claiming that it had breached a duty to ensure safety in the workplace. *Id.* at 853. She asserted that liability

would simply turn on state-law negligence principles. *Id.* at 854-855. This Court unanimously disagreed. After re-examining the policy underpinnings of *Lucas Flour* and *Lueck,* the Court held that the alleged duty of the union arose, if at all, from the collectively bargained agreements between the union and the employer, and that "questions of contract interpretation * * * underlie any finding of tort liability.' " *Id.* at 862. The Court stated:

> The need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers,* respondent is precluded from evading the preemptive force of § 301 by casting her claim as a state-law tort action. *Id.* (footnote omitted).[5]

Last year, in *Lingle* v. *Norge Division of Magic Chef,* 486 U.S. ___ , 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), the Court revisited these Section 301 preemption principles in a case representing the opposite end of the spectrum from *Lueck* and *Hechler.* Lingle sued in Illinois state court alleging that she had been discharged in retaliation for exercising her rights under the Illinois workers' compensation law. 108 S.Ct. at 1879. Lingle's union also filed a grievance on her behalf under the collective bargaining agreement contending that she had been discharged without "just cause"; an arbitrator ultimately ruled in Lingle's favor, ordering reinstatement with full backpay. *Id.*

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[5] In the same Term, in *Caterpillar Inc.* v. *Williams,* 482 U.S. 386 (1987), the Court unanimously held that an employer's removal of a lawsuit to federal court was improper because the "complete pre-emption" corollary to the well-pleaded complaint rule under Section 301, see *Avco Corp.* v. *Aero Lodge No. 735,* 390 U.S. 557 (1968), did not apply to claims for breach of *individual* employment contracts. *Id.* at 393-395. The employees in *Caterpillar* claimed that their employer had made individual promises (regarding the duration of employment) to them while in *non-union* positions. *Id.* at 388. They were later downgraded to union positions, and ultimately laid off. *Id.* at 389. Their state lawsuit eschewed reliance on the collective bargaining agreement. However, in finding the *individual* contract claims not preempted by Section 301, the Court reaffirmed its holdings in *Lueck* and *Hechler* that "[w]hen a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim * * *." *Id.* at 399.

In the meantime, the employer removed Lingle's retaliatory discharge suit to federal court, and argued that it should be dismissed under *Lueck* as preempted by Section 301. The district court agreed and dismissed the suit, and the Seventh Circuit affirmed. The court of appeals reasoned that "the same analysis of the facts" was implicated under both the "just cause" discharge grievance and the retaliatory discharge lawsuit. *Id.*

This Court reversed, once again unanimously. The Court reaffirmed the federal labor policies upon which *Lueck* and *Hechler* were grounded, but ruled that Lingle's state retaliatory discharge claim fell outside the rationale and holding of those cases because "resolution of the state-law claim does not require construing the collective-bargaining agreement." *Id.* at 1882 (footnote omitted). In contrast, the Court noted, in *Lucas Flour, Lueck,* and *Hechler* "pertinent principles of state law required construing the relevant collective-bargaining agreement. Not so here." *Id.* at 1882 n.7. The Court in *Lingle* stated the following test:

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and federal labor-law principles — necessarily uniform throughout the nation — must be employed to resolve the dispute. *Id.* at 1881 (footnote omitted).

Thus, while a mere "parallel" factual analysis between a labor contract claim and a state-law claim would be insufficient to produce Section 301 preemption, *id.* at 1883, the Court emphasized that a state-law remedy, "although nonnegotiable," could "nonetheless turn[ ] on the interpretation of a collective-bargaining agreement for its application," or that "a law appli[cable] to all state workers" could require, "at least in certain instances, collective-bargaining agreement interpretation" — and in both situations the state-law remedy would be preempted by Section 301. *Id.* at 1882 n.7.

The Court in *Lingle* additionally reiterated the admonition in *Lucas Flour* and *Lueck* that "[a] rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, * * * as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Id.* at 1884, citing *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29 (1987), and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Its decision in *Lingle*, the Court concluded, "should make clear that interpretation of collective bargaining agreements remains firmly in the arbitral realm." *Id.*

2. Resolution of respondents' claims under state law would destroy the uniformity essential to interpretation of the collective bargaining agreement.

In analyzing respondents' Michigan HCRA claims to determine whether they were preempted by Section 301, the eight judges of the Sixth Circuit *en banc* majority committed the same error as the lower courts in *Lueck* and *Hechler*: failing to recognize that the state-law claims were both rooted in and required interpretation of the collective bargaining agreement. Resolution of respondents' "handicap discrimination" claims unquestionably would require interpretation of the provisions of the Chrysler-UAW labor contract, which is the *sole* source of any right to accommodation in view of the Michigan Supreme Court's construction of the HCRA in *Carr* v. *General Motors Corp.*, *supra*. In this circumstance, it cannot be disputed that at least one aspect of respondents' HCRA claims "depends upon the meaning of a collective-bargaining agreement." *Lingle*, 108 S.Ct. at 1881.

The court of appeals' opinion in fact suggested, in broad terms, that this Court's *Lingle* decision may have approved a bright-line rule that Section 301 cannot preempt claims under state anti-discrimination laws (App., *infra*, 11a, 13a). In addition, the majority held that the accommodation provisions of the Chrysler-UAW collective bargaining agreement constitute mere "defenses" to respondents' HCRA claims that cannot produce

Section 301 preemption under *Caterpillar* (App., *infra*, 13a, 16a). What is more, the majority implied that respondents' disclaimer during oral argument "that they seek any collective bargaining agreement remedy" (*id.* at 13a) is somehow relevant or controlling when respondents' pleadings show otherwise. The court of appeals has thus disregarded the teachings of this Court's decisions in a fashion that has significant ramifications for the important federal interest in interpretive uniformity and predictability of contract terms and the federal policy favoring grievance arbitration as the exclusive means of resolving disputes.

As noted above, *Lingle* made plain that a variety of state law claims, even though representing *nonnegotiable* rights, would be preempted by Section 301 if, "at least in certain instances," they "turned on the interpretation of a collective-bargaining agreement." *Lingle*, 108 S.Ct. at 1882 n.7. The Court accordingly did not close the door to Section 301 preemption for all claims under state anti-discrimination laws. To the contrary, claims predicated on state anti-discrimination laws must be carefully scrutinized — as the Court scrutinized other state-law claims in *Lueck, Hechler*, and *Lingle* — to determine whether, "at least in certain instances, collective-bargaining agreement interpretation" is required for adjudication of the discrimination claim. *Id.* Indeed, the Court explicitly noted in *Lingle*, 108 S.Ct. at 1885, that anti-discrimination laws themselves "illustrate the relevant point for §301 preemption analysis" — whether "the existence or the contours of the state law violation [is] dependent upon the terms of the [labor] contract." While analysis of some state-law discrimination claims brought by union-represented employees may show that they are not preempted, other claims clearly will be preempted, and respondents' HCRA claims in the present case are archetypal examples of claims that are preempted. The apparent bright-line rule suggested by the court of appeals for discrimination claims is both wrong and inimical to the important federal policies underlying Section 301 preemption.[6]

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[6] Handicap accommodation claims by unionized workers often raise special preemption issues because an employee's physical or medical ability to perform

This Court held in *Lueck, Hechler*, and *Lingle* that it is necessary to focus on precisely what respondents must establish to prove *their particular* state-law claims — not the generic elements of an abstract claim, as the court of appeals did here (App., *infra*, 15a). The court of appeals essentially held that a discriminatory *motive* is all that respondents need establish in a discrimination case, and that establishing *motive* is unrelated to the terms of the bargaining agreement. This simplistic reasoning would, contrary to *Lingle*, apply to all disparate treatment discrimination claims. That reasoning ignores the source of the claimed right to accommodation which *in this instance* forms the basis of the HCRA suit: the collective bargaining agreement. Moreover, this Court in *Lueck*, 471 U.S. at 211, emphatically rejected the notion that the addition of a motivational factor (e.g., bad faith) to a contract-based claim would avoid preemption under Section 301.

Scrutiny of respondents' complaints demonstrates that their HCRA claims are grounded in the Chrysler-UAW agreement. Smolarek claimed a right to reinstatement to "his former position or another position consistent with his medical restrictions" (App., *infra*, 20a), a remedy not available under the HCRA but allegedly available under the labor agreement. Fleming's complaint likewise claimed a right to reinstatement to another position, and to "reasonable accommodations so as to allow [Fleming] to work despite his physical determinable handicap * * * *" (*id.* at 22a). In the instances of these particular "discrimination" claims, both respondents have unquestionably

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a job is a subject that employers (and unions) must inevitably address, and frequently do in collective bargaining agreements — often creating *favored* treatment exceeding that required by state anti-discrimination laws. See 2 Bureau of National Affairs, *Collective Bargaining Negotiations And Contracts, Basic Patterns In Union Contracts* 75:4 (1989) (33 percent of all collective bargaining agreements, and 44 percent in the manufacturing sector, grant special rights to employees no longer able to perform their regular work). That type of *favored* treatment is precisely what Chrysler and the UAW negotiated here. Because *favored* treatment is in issue, rather than adverse discriminatory treatment, these "handicap discrimination" claims are far different from typical disparate treatment discrimination claims.

asserted rights rooted in the collective bargaining agreement, because they exist nowhere else.

Moreover, adjudication of respondents' discrimination claims, in these instances, would require interpretation of the collective bargaining agreement to ascertain whether, and under what circumstances, they may be entitled to reinstatement to a former position, or to a different position, or to some other form of accommodation for their medical conditions. The agreement prescribes the procedures for accomodation as well. These are not "defenses" to an independent state-law claim, as was the case in *Caterpillar*. They are affirmative elements of respondents' claims. Nor are these mere factually "parallel" inquiries under the HCRA and the collective bargaining agreement, as was the case with the "just cause" and "retaliatory discharge" claims in *Lingle*. Here the inquiries are one and the same. It is *only* because of the collective bargaining agreement that the inquiry is made at all. The HCRA independently grants no such rights. It prescribes no procedures. "Since the extent of [the accommodation] duty depends upon the terms of the agreement between the parties, both are tightly bound with questions of contract interpretation that must be left to federal law." *Lueck*, 471 U.S. at 216. The court of appeals was thus plainly mistaken in its application of *Lingle* and *Caterpillar*, and has permitted respondents "to evade the requirements of §301 by relabeling their contract claims" as state-law discrimination claims. *Lueck*, 471 U.S. at 211.

The court of appeals' decision is not merely mistaken. It threatens to disrupt federal labor policy. If "state law [were] allowed to determine the meaning intended by the parties in adopting" the labor contract's provisions concerning accommodation, "all the evils addressed in *Lucas Flour* would recur." *Lueck*, 471 U.S. at 211. A single provision in a nationwide labor contract, such as that negotiated by Chrysler and the UAW (which covers over 60,000 employees in 17 States), may well be given a different meaning under the local discrimination or tort laws of one State than those of another. Michigan HCRA cases are tried to juries. Uniformity and predictability would accordingly be

destroyed. State law as discerned by a local jury would be substituted for the "law of the shop." This "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Lucas Flour*, 369 U.S. at 103.

Equally damaging to federal labor policy would be any attempt to award respondents relief under their state-law claims. Smolarek's complaint, for example, demanded reinstatement to a job, accommodation of his medical condition, lost compensation and benefits, and seniority — all of which must be ascertained under provisions and procedures of the Chrysler-UAW collective bargaining agreement (Smolarek C.A. App. 6). Permitting state court judges and juries to grant such relief, under the guise of a discrimination claim, would inevitably implicate and undermine the very foundations of the Chrysler-UAW agreement. A judge or jury could impose duties and create special privileges that are utterly inconsistent with the agreement and could severely prejudice the rights of respondents' co-workers and other members of the bargaining unit. Needless to say, this would "frustrate[ ] the effort of Congress to stimulate the smooth functioning of [the collective bargaining] process" and would "strike[ ] at the very core of federal labor policy." *Lucas Flour*, 369 U.S. at 104.

In summary, it is impossible *in this instance* to resolve respondents' HCRA claims without applying or interpreting the accommodation provisions of the collective bargaining agreement. They are packaged as "handicap discrimination" claims, but it is undisputed that the Michigan HCRA does not provide for the type of accommodation sought by respondents. Their claims are grounded, if at all, on the collective bargaining agreement. A judge or jury purporting to address their handicap discrimination claims would inevitably be forced to define the rights and responsibilities created by the agreement. The negotiation and administration of the agreement would thereby be subverted. As the Court held in *Lueck*, 471 U.S. at 211, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law * * *."

3. Resolution of respondents' claims under state law would frustrate the strong federal policy requiring settlement of labor disputes through arbitration.

The court of appeals did not consider the corrosive effect of its decision on one of the fundamental tenets of federal labor policy — the preservation of "the central role of arbitration in our 'system of industrial self-government.' " *Lueck*, 471 U.S. at 219, quoting *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960). See also *Lingle*, 108 S.Ct. at 1884. As the opinion of the seven dissenting Sixth Circuit judges warned, the majority's "overbroad precedent against finding §301 preemption" clearly endangers the role of labor arbitration, and "permit[s] an individual to sidestep available grievance procedures," citing *Lingle*, 108 S.Ct. at 1884 (App., *infra*, 26a-27a). It is uncontroverted that respondents' accommodation claims could have been prosecuted through the labor agreement's comprehensive grievance arbitration procedure. Respondents have nonetheless been permitted by the court of appeals' decision to sidestep that remedy.

The established policy of peacefully resolving labor contract disputes through grievance arbitration, see Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d), is greatly undermined by the court of appeals' decision. To "permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it." *Republic Steel* v. *Maddox*, 379 U.S. 650, 653 (1965). "[I]t would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." *Id.* The critical importance of this policy favoring dispute resolution through arbitration was recently affirmed in *Paperworkers* v. *Misco, Inc.*, 484 U.S. 29, 36-38 (1987).[7]

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[7] See also *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Employers that have negotiated exclusive grievance arbitration procedures are denied the benefit of their bargain when, as here, they are forced to litigate before state court judges and juries claims that are grounded in the contract and can (and should) be resolved through contractual procedures. As noted earlier, a multi-state employer that has negotiated a nationwide collective bargaining agreement could well have differing liabilities under the same contractual provision — depending upon the State in which it is decided or the local judge or jury that acts as fact-finder.

As is the case with other disputes over contractual rights and benefits, labor arbitrators are uniquely qualified to interpret and enforce the accommodation provisions of the Chrysler-UAW agreement. See *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 581-582 (1960); *Paperworkers* v. *Misco, Inc., supra.* An arbitrator would unquestionably possess the power to determine whether respondents were entitled to be placed in their former positions, or in different positions, or otherwise to have their medical conditions accommodated. If the arbitrator concluded that Chrysler had breached the contract, he would be empowered to award affirmative relief and compensation.

The critical point, however, is that whatever relief the arbitrator awarded would have been fashioned with due regard to the rights and responsibilities contained in the collective bargaining agreement as a whole, as modulated by the "law of the shop," and with an appreciation for the interests of all affected parties. A judge or jury awarding relief on respondents' HCRA claims, by contrast, could ride roughshod over the rights and expectations of the parties involved. Thus, preemption of respondents' claims under Section 301 is the only means of avoiding the "disruptive influence" of "contract terms hav[ing] different meanings under state and federal law," *Lucas Flour,* 369 U.S. at 103, and "mak[ing] clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm * * *." *Lingle,* 108 S.Ct. at 1884.

In the final analysis, the issue in this case, as in many labor preemption cases, is not whether respondents may object to the manner in which they were treated by their employer, but in *what forum* they may object and *under what substantive law and procedures.* This Court has already answered that question: "in enacting §301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour,* 369 U.S. at 104. The decision below is out of step with this principle. It makes "the process of negotiating an agreement * * * immeasurably more difficult," *id.* at 103, and clearly jeopardizes "the Congressional goal of a unified federal body of labor-contract law." *Lueck,* 471 U.S. at 220.

B. The Court of Appeals' Approach Conflicts With That Of Other Circuits

The sharp disagreement between the majority and the dissenting judges in the court of appeals mirrors the conflict of approach among the courts of appeals in factually similar cases. The circuits are divided as to the scope of Section 301 preemption, as well as the proper analysis under the tests set forth in *Lueck* and *Lingle.*

The Seventh Circuit's approach in *Douglas* v. *American Information Technologies Corp.,* 877 F.2d 565 (7th Cir. 1989), demonstrates the conflict with the Sixth Circuit's approach. In *Douglas* the plaintiff alleged that she suffered from physical or medical conditions that prohibited certain work, and claimed that her employer had denied her excused work days, subjected her to unjustified scrutiny, and disciplined and threatened her with discharge without justification. *Id.* at 567-568. Rather than pursuing a grievance under her collective bargaining agreement, and rather than asserting a handicap discrimination claim as respondents did here, Douglas sued on a state-law theory of "intentional infliction of emotional distress." *Id.* at 568.

Properly applying this Court's holdings in *Lucas Flour, Lueck,* and *Lingle,* the Seventh Circuit ruled that Douglas' state-law claim was preempted by Section 301. The court of appeals reasoned that her claim, upon scrutiny, pertained directly to terms and conditions established by the collective bargaining agreement,

such as excused work days, work scrutiny, discipline, and discharge, and that "[r]esolution * * * will require a court to interpret the collective bargaining agreement in order to determine whether or not [her employer's] allegedly wrongful conduct was authorized under the collective bargaining agreement." 877 F.2d at 572.

In sharp contrast, the Sixth Circuit held here that even though respondents' HCRA claims depended directly on accommodation rights provided in the Chrysler-UAW collective bargaining agreement, that agreement was merely a "defense" to a state-law claim that itself required no interpretation of the agreement. In addition, also in conflict with the Seventh Circuit's *Douglas* analysis, the Sixth Circuit merely focused on the generic elements of an abstract discrimination claim (especially "motivation") rather than factually scrutinizing the particular claim being made, as mandated by *Lingle*, to determine its relationship to the labor contract.

The approach to Section 301 preemption utilized by the Eighth Circuit in *Johnson* v. *Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989), likewise conflicts with that of the Sixth Circuit. A union-represented employee there sued under eight separate state-law theories, all arising from his discipline and discharge for allegedly slashing tires in the company parking lot. Following the directive of *Lingle*, the Eighth Circuit scrutinized the factual proofs pertinent to each claim to ascertain whether it arose from the collective bargaining agreement or required its interpretation. *Id.* at 624-625. It held some claims preempted and others not. One libel claim was preempted because it implicated collectively bargained plant rules, and "any judicial resolution of this libel allegation would necessarily involve construction of the collective bargaining agreement." *Id.* at 624. But a second libel claim concerning a post-discharge communication was held not preempted because it required no contract interpretation. *Id.* at 625. It is this claim-sensitive analytical approach, mandated by *Lingle* and *Lueck*, that the Sixth Circuit failed to undertake here.[8]

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[8] See also *Nash* v. *AT&T Nassau Metals*, 381 S.E.2d 206 (S.C. 1989), in which the South Carolina Supreme Court ruled that a union-represented

While the foregoing decisions held lawsuits preempted that had been packaged as state-law contract or tort claims,[9] rather than as handicap discrimination claims,[10] the factual and legal similarities between those cases and the instant one are manifest. The conflict in approach is also manifest. Regardless of an

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employee's state-law tort and contract claims, stemming from his employer's actions following a disability, were all preempted by Section 301 because the claims turned on contractual benefits and procedures set forth in the collective bargaining agreement. The South Carolina Supreme Court admonished that the lower court, in rejecting Section 301 preemption, had "failed to follow the directive of *Lueck* * * * that preemption be decided on a case-by-case basis." *Id.* at 209. The same is true of the Sixth Circuit's opinion here.

[9] Other Section 301 preemption decisions adopting the approach utilized in *Douglas* and *Johnson* include *Jackson* v. *Liquid Carbonic Corp.*, 863 F.2d 111, 118 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 3158 (1989) (privacy claims preempted inasmuch as they "do not rest upon inalterable state-law rights which float free of, and therefore do not require interpreting, the collective bargaining agreement"); *Hanks* v. *General Motors Corp.*, 859 F.2d 67 (8th Cir. 1988) (wrongful discharge claim preempted, other claims remanded for consideration of specific factual allegations); *Newberry* v. *Pacific Racing Assoc.*, 854 F.2d 1142 (9th Cir. 1988) (breach of implied covenant of good faith claim preempted); *Laws* v. *Calmat*, 852 F.2d 430 (9th Cir. 1988) (constitutional claim challenging drug testing preempted).

[10] The Ninth Circuit has considered Section 301 preemption of "handicap discrimination" claims in two cases, *Miller* v. *AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988) (Oregon law); and *Ackerman* v. *Western Electric Co.*, 860 F.2d 1514 (9th Cir. 1988) (California law). These opinions — in which the Ninth Circuit held that claims were *not* preempted — are not pertinent because the state handicap discrimination statutes at issue affirmatively required accommodation whereas the Michigan HCRA does not. See note 3,4 *supra*. The employees in *Miller* and *Ackerman* were accordingly relying upon statutory rights to accommodation which were "parallel" to any rights under a collective bargaining agreement. Compare *Lingle*, 108 S.Ct. at 1883, 1885.

The opposite is true here. As the Michigan Court of Appeals recently held on remand in *Metro* v. *Ford Motor Company, supra*, note 2, in the context of Michigan HCRA claims identical to respondents' here:

> Plaintiffs' complaints alleged that they were discriminated against due to their handicaps when they were denied their seniority rights under their collective-bargaining agreement. These claims do not merely allege discrimination which could also be the subject of a grievance action under the collective-bargaining agreement. Instead, plaintiff's claims rely upon seniority rights provided for under their collective-bargaining agreement in order to establish their discrimination claims. The resolution of plaintiffs' MHCRA claims would involve interpretation of their collective-bargaining agreement in order to determine plaintiffs' seniority rights and whether they were violated. Plaintiffs' claims require interpretation of the collective-bargaining agreement, so they are preempted by §301. Slip. Op. at 2.

employee's choice of state-law labeling — be it "discrimination," "tort," or something else — "the relevant point for §301 pre-emption analysis" is whether "the existence or the contours of the state-law violation [is] dependent upon the terms of the [labor] contract." *Lingle* 108 S.Ct. at 1885. "Any other result would elevate form over substance and allow parties to evade the requirements of §301 by relabeling their contract claims" as state-law actions. *Lueck*, 471 U.S. at 211.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 1989

APPENDICES

Appendix A

Nos. 86-2074/87-1387

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STANLEY SMOLAREK,
Plaintiff-Appellant, (86-2074)

v.

CHRYSLER CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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RALPH FLEMING,
Plaintiff-Appellant, (87-1387)

v.

CHRYSLER CORPORATION, a Delaware Corporation; LOUIS EBALDI and LYNDON VERLYNDON, jointly and severally,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed July 12, 1989

Before: ENGEL, Chief Judge; KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD,

MILBURN, GUY, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges; and PECK, Senior Circuit Judge.

WELLFORD, J., delivered the opinion of the court, in which KEITH, MERRITT, MARTIN, JONES, MILBURN and NORRIS, JJ., and PECK, S. J., joined. KENNEDY, J., (pp. 19-27) delivered a separate opinion concurring in part and dissenting in part, in which ENGEL, C. J., KRUPANSKY, GUY, NELSON, RYAN, and BOGGS, JJ., joined.

WELLFORD, Circuit Judge. These combined cases present close and difficult questions regarding whether § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts plaintiffs' actions claiming violations of Michigan's Handicappers' Civil Rights Act, M.C.L. § 37.1101 *et seq.* (HCRA), and retaliatory discharge in violation of public policy relating to the filing of workers' compensation claims. In each case the district court found plaintiff's state cause of action preempted by § 301 and dismissed the suit for failure to exhaust remedies. The Supreme Court's recent decision in *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988), holding that an action under Illinois law for the tort of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301, guides our decision in these cases.

SMOLAREK

Smolarek was employed by Chrysler from 1953 until his lay off in 1984 and was a member of the United Automobile Workers (UAW).[1] Since an injury in 1955, Smolarek has suffered from a seizure disorder, which normally has been controlled by medications. In October 1984, he suffered a seizure at work and was absent from work for the following two weeks. When he returned to work, he was informed that no

[1]The UAW has filed an amicus curiae brief in the *Smolarek* appeal arguing for reversal of the district court's judgment.

jobs consistent with the medical restrictions, under which he had worked for nearly thirty years, were available. In 1985 Smolarek again attempted to return to work and was told no work was available within his restrictions. Plaintiff alleges that at that time his foreman made the comment, "Stan, what if you fall down and other people in the plant see you and you are having a seizure. The other people could have a heart attack."

In April 1986, Smolarek filed a two count complaint in Michigan state court alleging discrimination under the HCRA and workers' compensation retaliation. He claimed that Chrysler discriminated against him by refusing to return him to his former position based on a handicap unrelated to his ability to perform his job duties, and that Chrysler also refused to reinstate him based on its fear that he might injure himself during a seizure on the job and file a workers' compensation claim. Smolarek did not allege any violation of the collective bargaining agreement between the UAW and Chrysler.

Chrysler removed the case to federal district court claiming federal question jurisdiction. Smolarek filed a motion to remand, which the district court denied on the grounds that § 301 preempted Smolarek's claims. The district court then dismissed Smolarek's action because he had failed to exhaust his intra-union remedies before filing a § 301 action. Smolarek now appeals the district court's denial of his motion to remand solely on the handicap discrimination issue.

FLEMING

Chrysler hired Fleming, also a UAW member, in 1976 as a painter-glazer. In August 1984 Fleming was injured while leaving the Chrysler plant, and as a result he suffered some loss of balance, severe headaches, muscle spasms in his back, and nausea. Fleming continued to work with some medical restrictions on the kind of work he could do. Fleming claims

that following his injury he was given job assignments inconsistent with his limitations. Fleming further contends that this "harassment" increased when he expressed his intent to file a workers' compensation claim. In October 1984, Fleming was laid off indefinitely. Chrysler claims his lay off was due to lack of work, as allowed by the collective bargaining agreement. Fleming claims that, while technically on lay off, he was told he was being dismissed.

In December 1984 Fleming grieved his lay off. This grievance was pursued to the third step of a four-step grievance procedure before Fleming voluntarily terminated his employment in May 1986 by relinquishing his recall rights as part of a settlement of his workers' compensation claim filed in February 1985.

Fleming filed a complaint in state court in July 1985, alleging violation of HCRA, discharge in retaliation for expressed intent to file a workers' compensation claim, breach of implied duty of good faith and fair dealing, and intentional interference with his quiet and peaceful pursuit of a lawful occupation. In August 1985 Chrysler removed the suit to federal district court. In October 1985 the district court denied Fleming's motion to remand on the grounds that the latter two counts of Fleming's complaint conferred original jurisdiction on the federal court.

Chrysler then filed a motion for summary judgment arguing that Fleming's claims were preempted by § 301. Finding that all of Fleming's claims were preempted, the district court granted the motion and dismissed the case. Fleming appeals this dismissal only with regard to the HCRA and retaliatory discharge claims.

Removal and § 301 Preemption

Ordinarily, the question of removability to federal court under 28 U.S.C. § 1441 turns upon application of the "well-pleaded complaint rule." Federal jurisdiction exists

only when a plaintiff's properly pleaded complaint presents a federal question on its face.

> The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint. *See Gully v. First National Bank,* 299 U.S. 109, 112-113, 57 S. Ct. 96, 97-98, 81 L.Ed. 70 (1936). The rule makes the plaintiff the master of the claim; he or she may avoid the federal jurisdiction by exclusive reliance on state law.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) (footnote omitted); *see also Oklahoma Tax Comm'n v. Graham,* 109 S.Ct. 1519, 1521 (1989) (per curiam) (discussing *Caterpillar*). In the context of employment-related actions, however, a claim purportedly based solely on state law may, under appropriate circumstances, be removable because § 301 of the LMRA has preempted that particular area of state law. In other words, "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar,* 482 U.S. at 393. Thus, in the cases we now consider, the issues of federal preemption and removability largely merge; we must focus on whether plaintiffs' state-law claims are preempted by § 301 so as to place them within the scope of the "complete preemption" corollary to the well-pleaded complaint rule.

In a series of cases, the Supreme Court has made clear that § 301 of the LMRA preempts any state-law claim arising from a breach of a collective bargaining agreement. *See Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957); *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962); *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *see also Lingle v. Norge Division of Magic Chef, Inc.,*

108 S. Ct. 1877 (1988). The purpose of this rule is to require that all claims raising issues of labor contract interpretation be decided according to the precepts of federal labor law in order to prevent inconsistent interpretations of the substantive provisions of collective bargaining agreements. *Lucas Flour*, 369 U.S. at 103.

> Thus, *Lueck* faithfully applied the principle of § 301 preemption developed in *Lucas Flour*: if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute.

Lingle, 108 S. Ct. at 1881 (footnotes omitted).

In *Allis-Chalmers v. Lueck*, the Court expanded the preemptive reach of § 301 to state-law tort claims. In *Lueck* the Court considered whether a state-law cause of action for bad faith handling of an insurance claim was preempted because the insurance plan provisions were included in a collective bargaining agreement. The Court found the state claim was preempted because an essential element of the tort (*i.e.*, bad faith handling) required interpretation of the labor agreement regarding whether the plaintiff was due payments. Because the duty claimed to have been breached was "derive[d] from the rights and obligations established by the contract," the Court reasoned that "any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 217, 218.

Although the Court limited its holding in *Lueck* to the specific facts of that case and made clear that not "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement... necessarily is

pre-empted by § 301," *id.* at 220, the Court did attempt to define the preemptive scope of § 301:

> Our analysis must focus, then, on whether the [state-law cause of action] confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state-law] claim is inextricably intertwined with consideration of the terms of the labor contract.

Id. at 213.

At the same time, we must keep in mind that

> Section 301 does not ... require that all "employment-related matters involving unionized employees" be resolved through collective bargaining and thus be governed by a federal common law created by § 301.... The Court has stated that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the *federal* labor law." *Allis-Chalmers*, 471 U.S. 202, 211, 105 S. Ct. 1904, 1911, 85 L.Ed.2d 206 (1985).

Caterpillar, 482 U.S. at 396 n.10 (emphasis added). *See also Oklahoma Tax Comm'n v. Graham*, 57 U.S.L.W. 4400, 4405 (1989) (per curiam). The Supreme Court has recently then reiterated what it stated earlier: "[E]ven under § 301 we have never intimated that any action relating to a contract within the coverage of § 301 arises exclusively under that section." *Franchise Tax Board of Calif. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n.28 (1983); *see also Caterpillar*, 482 U.S. at 396 n. 10: "The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under the NLRA does *not* establish that they are removable to federal court." *Caterpillar*, 482 U.S. at 398 (footnote omitted) (emphasis added).

In its recent decision addressing asserted § 301 preemption of state-law claims, the Supreme Court has attempted to clarify its language in *Lueck* regarding what kind of "independence" of state-law actions from collective bargaining agreements permits a finding of non-preemption. In *Lingle*, 108 S. Ct. 1877 (1988), the Court held that a unionized employee's state-law action based on Illinois's tort of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301 because "the state-law remedy ... is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: *resolution of the state-law claim does not require construing the collective-bargaining agreement.*" 108 S. Ct. at 1882 (emphasis added) (footnote omitted). In so concluding, the Court rejected the contentions of the employer that the retaliatory discharge action was not independent because resolution of the state-law claim would implicate the same factual analysis as would a grievance brought under the CBA's "just cause" provision. *Id.* Thus, *Lingle* stands as the Court's latest word on § 301's preemptive scope and, as such, will guide our decision in these cases.

The Workers' Compensation/Retaliatory Discharge Claim

Fleming filed a state-law suit claiming that he was effectively discharged (technically, he was laid off) because of his expressed intention to file a workers' compensation claim. The district court found that Fleming's state-law claim was preempted by § 301, and Chrysler argues that this decision was correct because the retaliatory discharge claim is inextricably intertwined with the terms of the collective bargaining agreement.

Fleming's claim is essentially the same as the claim that the Court addressed in *Lingle*. In order for a plaintiff to show retaliatory discharge under Michigan law, he must demonstrate that he was discharged by his employer in retaliation for the filing of a lawful claim for workers' compensation.

See Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151, 154 (1976). As the Court reasoned in *Lingle*: "Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." 108 S. Ct. at 1882. Consequently, here, as in *Lingle*, the state-law tort of retaliatory discharge creates rights independent of those established by the collective bargaining agreement and hence is not preempted by § 301. *See also Dougherty v. Parsec, Inc.*, No. 86-3482, slip op. (6th Cir. Apr. 18, 1989); *Benton v. Kroger Co.*, 635 F. Supp. 56 (S.D. Tex. 1986).

Whether Fleming's claim of retaliatory discharge under these circumstances will be deemed to state a proper cause of action in state court is a question we do not decide. It is a state claim, sufficiently set out as separate and apart from a collective bargaining contract claim, and thus avoids preemption. Chrysler has cited *Wilson v. Acacia Park Cemetery*, 162 Mich. App. 638, 413 N.W.2d 79 (1987), in support of its position, but applicability of *Wilson* is a question of state law to be considered on remand and not by us at this juncture.[2]

Fleming has exclusively relied on a state law retaliation claim without reference to the collective bargaining agreement. We conclude that this claim is not so "inextricably intertwined with consideration of the terms of the labor contract" that this claim is preempted under § 301. *Lueck*, 471 U.S. at 213. This state law claim "can be resolved without interpreting the agreement itself. . . ." *Lingle*, 108 S. Ct. at 1883.

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[2] *Wilson* does observe that claims arising under HCRA, like Title VII claims, are "directed toward enforcement of statutory rights, not contractual rights arising from the collective bargaining agreement." 162 Mich. App. 638, 413 N.W.2d at 81.

Accordingly,we conclude that the district court erred in finding § 301 preemption with regard to Fleming's retaliatory discharge claim.

The Handicap Discrimination Claims

Smolarek and Fleming make the following argument against preemption of their handicap discrimination (HCRA) claims: The rights created by HCRA are in addition to and independent of any rights created by the UAW-Chrysler collective bargaining agreement. They argue that these rights exist regardless of the terms of the collective bargaining agreement and apply equally to union and nonunion employees. Furthermore, they assert that the individual rights established by HCRA are the type of "nonnegotiable" rights that *Lueck* exempted from § 301 preemption and that cannot be bargained away by a collective bargaining unit. In summary, plaintiffs contend that success on the HCRA claim is not contingent on showing that any provision of the collective bargaining agreement was breached; therefore, the federal policy concern regarding interpretive uniformity is not implicated in these cases as set out in *Lingle*.

Chrysler counters these arguments by asserting that in these particular cases, evaluation of plaintiffs' HCRA claims will require consideration of collective bargaining agreement terms. The HCRA provisions applicable to Smolarek's and Fleming's claims require that an employer not "[d]ischarge or otherwise discriminate against an individual with respect to . . . the *terms, conditions, or privileges of employment*," or "[l]imit, segregate, or classify an employee . . . in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." M.C.L. § 37.1202(1)(b), (c) (emphasis supplied). Thus, Chrysler asserts that, in the case of a union employee, the HCRA itself requires reference to the "terms, conditions,

and privileges of employment"—matters defined by the collective bargaining agreement. Finally, Chrysler and amicus curiae, Michigan Manufacturers Association, argue that to allow union employees to pursue this type of HCRA claim could disrupt and/or by-pass the collective bargaining process and grievance procedures.

The Supreme Court in *Lingle* approved, in dicta, the Seventh Circuit's recognition that " '§ 301 does not preempt state antidiscrimination laws, even though a suit under these laws, like a suit alleging retaliatory discharge, requires a state court to determine whether just cause existed to justify the discharge.' " 108 S. Ct. at 1885 (quoting *Lingle*, 823 F.2d at 1046 n.17). The Court went on to note that "the mere fact that a broad contractual protection against discriminatory—or retaliatory—discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract." *Id.*, 108 S. Ct. at 1885. Chrysler, however, seeks to distinguish HCRA from other state anti-discrimination statutes in that HCRA expressly recognizes that some handicaps are related to job performance and does not purport to protect persons with those handicaps. *See Carr v. General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686, *amended by* 426 Mich. 1231, 393 N.W.2d 873 (1986) (holding that a plaintiff who concededly cannot perform the duties of a particular job and who claims that his employer must accommodate him does not state a claim under HCRA).

(1) *Smolarek's HCRA Claim*

On appeal from the district court's order denying his motion for remand, Smolarek specifically argues that Chrysler violated its duties under HCRA by refusing to return him "to his former position or another position consistent with his medical restrictions and has maintained [him] instead on a disability lay off indefinitely." Chrysler responds that this

state-law claim is "substantially dependent" on interpretation of the collective bargaining agreement's provisions regarding an employee's right to reinstatement following disability leave and characterizes Smolarek's claim as asserting a breach of ¶ 53 of the collective bargaining agreement, entitled "Reinstatement after Disability."

Under HCRA, an employee has the initial burden of proving that the employer violated the Act. *Gloss v. General Motors Corp.*, 138 Mich. App. 281, 360 N.W.2d 596, 598 (1984). Smolarek might carry this burden by demonstrating that Chrysler had refused to reinstate him following his disability leave because of his seizure disorder which he first contends does not prevent or disqualify him from working at his former position. *Id.* at 598, 599. The fact that the collective bargaining agreement contains a provision regarding reinstatement does not compel a finding of § 301 preemption. "The mere fact that a broad contractual protection against discriminatory . . . discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract." *Lingle*, 108 S. Ct. at 1885, *quoted in Ackerman v. Western Elec. Co.*, 860 F.2d 1514, 1517 (9th Cir. 1988). Even if Smolarek may have been able to charge Chrysler under these circumstances with a violation of the collective bargaining agreement, he did not choose to do so and this does not mean that § 301, even if applicable but not utilized by plaintiff, preempts the claim. *See Catepillar*, 482 U.S. at 396. This is not a case in which the duty claimed to have been breached (*i.e.*, the duty not to discriminate) arises solely from the collective bargaining agreement. *Cf. International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851 (1987) (duty to provide safe workplace derived solely from collective bargaining agreement). Nor is this a case in which evaluation of Chrysler's prima facie liability will necessarily require determination of whether the collective bargaining agreement has been breached. *Cf. Lueck*, 471 U.S. 202.

Chrysler may, in its own defense, assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement and therefore was not based on Smolarek's handicap. The assertion of a defense requiring application of federal law, however, does not support removal to federal court:

> It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. *But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule*—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

Caterpillar, 482 U.S. at 398-99 (emphasis added).

Chrysler and Judge Kennedy, in her separate opinion, seem to take the position that since plaintiffs may not be able to prevail on their separate HCRA claim under Michigan law to the extent they seek accommodation for their medical restrictions, *see Carr v. General Motors* and its progeny, then they must therefore be seeking a contract remedy. At oral argument, counsel for plaintiffs expressly disclaimed that they seek any collective bargaining agreement remedy, and we believe their respective complaints support this proposition. In any event, under our ruling, they are limited to pursuit of remedies sought outside the collective bargaining agreement context.

We find that Smolarek's complaint pleaded a cause of action based solely on Michigan's HCRA, a statute that *Lingle* suggests has not been completely preempted by § 301.

Accordingly, we conclude that the district court erred in denying Smolarek's motion for remand to state court.

Smolarek's complaint makes reference to his reporting to work "to his former position," and that "defendant has refused to return plaintiff to his former position" in violation of HCRA. It would therefore be necessary for plaintiff to establish under this allegation that Chrysler violated its HCRA duty, independent of the collective bargaining agreement, not to deprive him of his former job status "because of a handicap that is unrelated to the individual's [Smolarek's] ability to perform the duties of a particular job or position," which he had performed for many years satisfactorily. *See* MCLA § 37.1202(1)(a). Only if found not capable of working at this former job would the court be concerned with Smolarek's alternative contention that he be placed in "another position consistent with his medical restrictions." Complaint, paragraph 16. That Chrysler may defend this latter alternative claim by reference to its responsibilities under the collective bargaining agreement in respect to reasonable accommodation of Smolarek's "medical restrictions" is, in our view, no basis to hold that § 301 preemption is mandated under these circumstances. *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. 851, does not direct otherwise. In footnote 5 of that decision, the Court stated "Hechler argued below simply that the Union's duty of care arose from and was determined by the collective-bargaining agreement . . . ." *Id.*, 481 U.S. at 863 n.5. Smolarek makes no such waiver or abandonment of his theory and assertion of rights under Michigan's HCRA. *Compare Hechler*, 481 U.S. 862, 864 n.5, stating: ("[w]e decline to rule on the impact of *hypothetical*-state law when the relevance of such law was neither presented to or passed upon by the courts below, nor presented to us in the response to the petition for certiorari") (emphasis added).

As the Supreme Court noted in *Caterpillar*, although the state court may need to determine whether § 301 preempts

Smolarek's claim in light of Chrysler's defense based on the collective bargaining agreement, this court need not consider that issue.[3] 482 U.S. at 398 n.13. It is sufficient that we find that Smolarek's well-pleaded complaint did not arise under federal law or under the collective bargaining agreement, and was not unextricably intertwined with the latter.

(2) *Fleming's HCRA Claim*

In contrast to Smolarek's appeal from an order denying remand, Fleming appeals directly from the district court's decision finding § 301 preemption of Fleming's HCRA and retaliatory discharge claims. Therefore, we must consider the preemption issue, whether raised in Fleming's complaint or by Chrysler's defenses.

Fleming asserted in his complaint that Chrysler violated HCRA by failing to provide him with work consistent with his medical restrictions and by effectually terminating him because of his handicap. Chrysler may rely upon the collective bargaining agreement or the Michigan *Carr* rule that it is not called upon to accommodate Fleming if his handicap precludes him from working. *See also DesJardins v. The Budd Co.*, No. 98092, slip op. (Mich. App. Oct. 25, 1988) (unpublished opinion). To establish prima facie liability under the HCRA, he must demonstrate (1) that Chrysler took adverse employment actions against him and (2) that the actions were motivated by his handicap. As in *Lingle*, these are "purely factual questions" relating to the conduct and motivation of the employer. "Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." 108 S. Ct. at 1882.

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[3]Our conclusion that Fleming's HCRA claim is not preempted by § 301, *infra*, however, suggests, but does not compel, the conclusion that a state court considering the issue in Smolarek's case might reach.

To defend against the HCRA charge, Chrysler must show that its actions were motivated by some factor other than Fleming's handicap. We recognize that Chrysler is likely to assert as its defense to Fleming's claim that it based its actions on the provisions of the labor agreement regarding reinstatement and accommodation. Even this defense, however, does not require a finding of preemption. In order to resolve the HCRA claim in light of this defense, a court need only decide whether Chrysler took actions adverse to Fleming because of his handicap or rather solely because Chrysler felt bound by the union agreement to take the actions or for some other legitimate reason. It is *not* necessary to decide at the outset whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: What was Chrysler's motivation? Under *Lingle*, therefore, Fleming's HCRA claim is sufficiently "independent" of the collective bargaining agreement to escape § 301 preemption, for "resolution of the state-law claim does not *require* construing the collective-bargaining agreement." 108 S. Ct. at 1882 (emphasis added) (footnote omitted). Accordingly, we conclude under our understanding of *Lingle* that the district court erred in finding Fleming's HCRA claim preempted by § 301.[4]

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[4]This conclusion is not inconsistent with our decision in *Maynard* v. *Revere Copper Products, Inc.*, 773 F.2d 733 (6th Cir. 1985). There we found that an employee's claim for damages against his union for breach of the union's duty of fair representation, brought pursuant to a provision of Michigan's HCRA, was preempted by § 301. The holding in *Maynard* was based on the fact that the HCRA fair representation provision "created no new rights for an employee and imposed no duty on a union not already clearly present under existing federal labor law." *Id.* at 735. Unlike the fair representation duty considered in *Maynard*, however, the duty not to discriminate based on handicap is not a duty already existing in the federal labor law. Therefore, the concerns regarding interpretative consistency that *Maynard* raised are not present in the instant appeal. *McCall v. Chesapeake & Ohio Railway Co.*, 844 F.2d 294 (6th Cir.), *cert. denied*, 109 S.Ct. 196 (1988), did not involve the question of § 301 preemption.

(3) *Other Case Law Precedent*

We decided only recently a comparable case involving a claim under the Michigan HCRA and a defendant automobile maker to reverse a district court judgment of § 301 preemption and direct that plaintiff employee's claim be remanded to state court. *DeRoseau v. Ford Motor Co.*, Nos. 87-1959, 88-1153, slip op. (6th Cir. Jan. 20, 1989). This result obtained despite the existence of potential collective bargaining agreement remedies. Holding *Lingle* determinative, another court reached the same result under a California handicap discrimination statute. *Ackerman v. Western Elec. Co., Inc.*, 860 F.2d 1514 (9th Cir. 1988). The same result was indicated as to a similar Oregon law in *Miller v. AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988).[5] Other federal district courts in Michigan have reached the same result we have indicated here on the question of whether § 301 or fed-

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[5]*Ackerman* did discuss the circumstance that under the California laws the employer might be directed to accommodate the claimant's handicap. The attempted distinction drawn between the statute and the Michigan law on accommodation is, in our view, immaterial. The employer's defense in *Ackerman* was the CBA provision "which broadly prohibits discrimination on the basis of race, color, religion, sex, age ... or because of handicap," and that interpretation and enforcement of that CBA clause was "inextricably intertwined" with the asserted state law handicap claim. *Id.* at 1517. This is the same argument made by Chrysler. *Ackerman* points out that it was a matter of affirmative defense to show whether the employee could perform the job duties "in a manner which does not endanger his or her health and safety or the health and safety of others." *Id.* at 1518. Chrysler, in the instant case, may raise a similar affirmative defense in state court under the Michigan statutory scheme. *Miller* was formulated before *Lingle*, and refers to *Lingle* only in n.6 as confirming "the approach we have taken," and reaffirming "the holding of *Allis-Chalmers*." 850 F.2d at 551. Oregon's HCRA "declared discrimination based on physical handicap an unlawful employment practice" regardless of whether a CBA contained similar provision, as does the Michigan law. *Id.* at 550. *Miller* distinguished the district court's decision in *Fleming* reported at 659 F. Supp. 392 (E.D. Mich. 1987).

eral labor law preempts a state handicap claim. *See Kazor v. General Motors*, 585 F. Supp. 621 (E.D. Mich. 1984); *Turk v. General Motors*, 637 F. Supp. 739 (E.D. Mich. 1986); *Nolte v. Blue Cross/Blue Shield of Mich.*, 651 F. Supp. 576 (E.D. Mich. 1986) (holding *Stephens v. Norfolk & Western Ry.*, 792 F.2d 576 (6th Cir. 1986) and *Maynard v. Revere Cooper Prod.*, 773 F.2d 733 (6th Cir. 1985) inapposite); *Twombley v. Ford Motor Co.*, 666 F. Supp. 972 (E.D. Mich. 1987). These cases were decided before *Lingle* and *Caterpillar*. For cases in jurisdictions other than Michigan, see *Austin v. Northeast Tel. & Tel.*, 644 F. Supp. 763 (D. Mass. 1986) and *Elstner v. Southwestern Bell Tel. Co.*, 659 F. Supp. 1328, 1344 (S.D. Tex. 1987). *See also DeSoto v. Yellow Freight Systems*, 861 F.2d 536 (9th Cir. 1988) (reversing a prior decision of preemption under § 301 in light of *Lingle*).

In sum, based primarily upon *Lingle* and upon the other precedent discussed, we hold that because resolution of neither Fleming's retaliatory discharge claim nor his handicap discrimination claim would necessitate interpretation of a collective bargaining agreement, those claims are not preempted by § 301. The judgment of the district court in Fleming's case is accordingly REVERSED, and the matter REMANDED for further proceedings. We further find that because Smolarek's complaint asserted solely a violation of Michigan's HCRA and presented no question of federal law, removal to federal court was improper in this case, and the district court erred in denying Smolarek's motion to remand. The order of the district court denying remand is REVERSED, and the case is ordered REMANDED to Michigan state court.

KENNEDY, Circuit Judge, concurring in part and dissenting in part. I concur with the majority that Fleming's retaliatory discharge claim is not preempted by § 301 because resolution of that claim does not require interpretation of the collective bargaining agreement; reversal of the District Court's judgment on the issue is therefore appropriate. I respectfully dissent, however, from the majority's failure to hold that certain aspects of plaintiffs' claims alleged to be under the Michigan Handicappers' Civil Rights Act (HCRA) *are* preempted by § 301. On the basis of the pleadings, as well as looking beyond the pleadings, the standard followed in *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, 481 U.S. 851 (1987), I would hold that Smolarek's claim is preempted to the extent that he claims a right to reinstatement to a position other than his former job; and that Fleming's claim is preempted to the extent that he claims a right beyond adaptive aids or devices to enable him to perform his former job. I would therefore find that removal jurisdiction exists based upon a federal question; I would AFFIRM the District Court's order denying Smolarek's motion to remand to Michigan state court, and would AFFIRM the District Court's grant of summary judgment to Chrysler with respect to the preempted aspects of Fleming's HCRA claim. I would REMAND the non-preempted portion of plaintiffs' claims to District Court to exercise its discretion whether to retain the remaining pendent state law claims or to remand the pendent claims to the state court.

I. The Standard for Preemption

I agree with the majority on the applicable standard to determine preemption under § 301. State law claims are preempted unless the state law "confers non-negotiable state-law rights . . . *independent* of any right established by contract, or, instead, whether evaluation of the [state-law] claim is *inextricably intertwined* with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S.

202, 213 (1985) (emphasis added). *See Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877, 1882 (1988) (state-law remedy is independent if "resolution of the state-law claim does not require construing the collective bargaining agreement"). I disagree, however, on the majority's application of that standard to the plaintiffs' claims.

II. The Pleadings

In general, the question of whether removal jurisdiction exists based upon a federal question is answered by reviewing the complaint as of the time of removal. *See O'Halloran v. University of Washington*, 856 F.2d 1375, 1379 (9th Cir. 1988); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1065 (9th Cir. 1979); 14A Wright, Miller, & Cooper, *Federal Practice and Procedure*, § 3721, at 213 & n.79 (and cases cited therein).[1] The majority notes that plaintiffs' counsel expressly disclaimed any collective bargaining remedy at oral argument, and believes that plaintiffs' complaints support the disclaimer. *See* Majority Opinion at 13.

With respect to plaintiffs' disclaimer, removal jurisdiction is not tested at the time of oral argument; rather, the Court must look to the face of the complaint *at the time of removal*. There is no indication in the record that plaintiffs attempted to amend their complaint at that time, and they may not effectively make such an amendment upon appellate review. The complaints and the substance of plaintiffs' claims do present a § 301 federal question.

At the time of removal, Smolarek claimed a right to reinstatement to "his former position or *another* position consistent with his medical restrictions." Smolarek's Complaint, ¶ 16, Jt App 5-6 (emphasis added). To the extent that Smo-

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[1]For the exception to the general rule, *see Libhart*, 592 F.2d at 1066 (federal district court's judgment may be upheld even if no removal jurisdiction if case was tried on the merits).

larek asks for reinstatement to *another* position, his claim is clearly preempted. There is no right independent of the collective bargaining agreement to be reinstated to another job consistent with one's medical disability under the HCRA. *Carr v. General Motors Corp.*, 425 Mich. 313 (1986); *Desjardins v. The Budd Co.*, C.A. No. 98092 (Mich. App. 1988) (unpublished opinion).

Chrysler contends that not only is there no duty under HCRA to reinstate Smolarek to a *another* position, there is also no duty to reinstate him to his *former* position even if its reason for failing to do so was unrelated to his ability to perform the requirements of that job. The basis of this contention is that Chrysler had already accommodated Smolarek's epilepsy for many years under the collective bargaining agreement, and that he could not have performed the *original* requirements of his job as a tool and die maker without this contractual accommodation in the collective bargaining agreement.

This is a difficult question to answer. The Michigan Supreme Court has made it clear that an employer has no duty to accommodate an employee's medical restrictions that are related to his ability to perform the duties of a particular job. *Carr*, 425 Mich. 313. The HCRA prohibits discharge only for "a handicap that is *unrelated* to the individual's ability to perform the duties of a particular job or position." M.C.L. § 37.1202 (emphasis added). However, the Michigan courts have not addressed the precise question of whether the HCRA refers to an individual's ability to perform the job as originally defined, or to perform the standards of the job as *redefined* or "carved-out" for a particular employee.

The Michigan courts might hold that the proper reference point for Smolarek's ability to perform his former job is the "carved-out" position. Assuming that the Michigan courts so hold, Smolarek would have a claim under the HCRA if he was able to perform the "carved-out" job from which he

was discharged, and the discharge was due to an unfounded fear of epileptics. I leave to another day whether the right under the HCRA would be parallel to, or, as I believe, "inextricably intertwined" with, the terms of the collective bargaining agreement. Resolution of this issue may depend on how the right is defined as a matter of state law. I make no attempt to resolve this question today, since it would merely be dicta in a dissent.

The majority fails to note that Fleming's claim is also preempted to the extent that he claims a right to reinstatement to *another* position. Such rights are "inextricably intertwined" with the contract, and must be pursued under § 301. Fleming's complaint states that Chrysler breached its duties under the HCRA by "[f]ailing to suggest and/or implement reasonable accommodations so as to allow Plaintiff to work despite his physical determinable handicap in violation of MCLA 37.1101 *et. seq.*" Fleming's Complaint, Count II ¶ 3(c), Jt App 12. Reviewing the complaint as of the time of removal, it is clear that Fleming was requesting an accommodation that has been held outside of HCRA's scope by *Carr*. This conclusion is also evident in Fleming's deposition testimony, in which he admits that he cannot perform the requirements of his former job without being accommodated. *See* Fleming Deposition, Jt App 177. The only source of Chrysler's duty to make "provisions [for] me to do my job," *id.*, is the collective bargaining agreement. It is, however, possible to construe Fleming's claim as requesting "adaptive aids or devices . . . thereby enabling [him] to perform the specific requirements of [his job as a painter-glazer]." M.C.L. § 37.1202(1)(g). To that extent, his claim would not be preempted, and would be a pendent state-law claim analogous to Smolarek's "pretext" claim.

III. Beyond the Pleadings

Even if this Court were not required to test removal jurisdiction as of the time the removal petition was filed, those

aspects of Smolarek's and Fleming's claims beyond their former positions are preempted under the complete preemption doctrine. As explained by the Supreme Court in *Hechler*, 481 U.S. 851, this Court must look beyond the pleadings to the entire claim, and determine whether or not it is based on the collective bargaining agreement, rather than on non-negotiable rights conferred under the HCRA.

In *Hechler*, the plaintiff argued that her union had breached its duty of care to ensure a safe workplace. She contended that the collective bargaining agreement was not implicated and that she was solely relying on state common law. In finding her claim preempted, the Supreme Court refused to accept her state-law argument on its face. Instead, the Court went beyond the pleadings and ascertained that although the *employer* had such a duty, the union's duty flowed solely from the collective bargaining agreement:

> Respondent's allegations of negligence assume significance if—and only if—the Union, in fact, had assumed the duty of care that the complaint alleges the Union breached. The collective bargaining agreement between the Union and Florida Power . . . contain[s] provisions on safety and working requirements for electrical apprentices on which Hechler could try to base an argument that the Union assumed an implied duty of care. In order to determine the Union's tort liability, however, a court would have to ascertain, first, whether the collective bargaining agreement in fact placed an implied duty of care on the Union . . . .

481 U.S. at 861-62 (footnote omitted). The plaintiff could not avoid § 301 preemption by simply asserting that she had a state-law tort claim.

As in *Hechler*, Smolarek and Fleming ask us to wear blinders. Plaintiffs conceded during oral argument that their claim to accommodation to *another* position under the HCRA was

eliminated by the Michigan Supreme Court's holding in *Carr*, 425 Mich. 313. They attempted to sidestep this apparent concession, however, through their "floor of rights" theory. Under this theory, they posit that although an employer need not provide for a right to reinstatement following a disability, if it does provide that right—either through the collective bargaining agreement or voluntarily—it must not discriminate in giving that right to all groups. We must, however, examine whether the "floor of rights" in this case derive from non-negotiable rights conferred by the HCRA, or if the genes's is from *negotiable* rights, whether derived from the collective bargaining agreement or voluntary action.

Appellants analogize their "floor of rights" theory to race, sex, and age discrimination cases. The problem with this analogy is that race, sex, and age discrimination are classic examples of "*nonnegotiable* rights . . . independent of any right established by contract." *Allis-Chalmers*, 471 U.S. at 213. These cases fall under the doctrine of complete parallelism, as explained by the Supreme Court in *Lingle*:

> [E]ven if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes.

108 S. Ct. at 1883. In race, sex, and age cases, interpretation of the collective bargaining contract is unnecessary. The same case could be heard in a state tribunal considering the employer's motive for terminating the employee, or by an arbitrator considering whether the employer was justified under a "just cause" collective bargaining provision. The right to be free of race, sex, or age discrimination is independent of any ancillary right contained in a collective bargaining agreement.

Likewise, if an employee is terminated for a handicap *unrelated* to his ability to perform the functions of his job, interpretation of a collective bargaining agreement is unnecessary to his claim. The HCRA has provided a *nonnegotiable* right to be free of this type of discrimination. In contrast, however, the HCRA confers no right of accommodation. Accommodation is therefore a *negotiable* right provided either by contract, here the collective bargaining agreement, or voluntarily. To allow the extension of HCRA's non-discrimination language once negotiable rights are given would impermissibly bootstrap an accommodation requirement into the HCRA. Thus, the "floor of rights" argument simply restates that which is impermissible: "you are not required to give rights, *i.e.*, accommodate employees, but once you do, you cannot discriminate with respect to that discrimination."

Although the majority feels otherwise, plaintiffs' position is not strengthened by the Ninth Circuit's finding that there was no § 301 preemption in *Ackerman v. Western Elec. Co.*, 860 F.2d 1514 (9th cir. 1988), and in *Miller AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988). Those cases found that Ackerman's (*California*) and Miller's (*Oregon*) handicap discrimination claims were not preempted by § 301 because they did not "require interpretation of a collective bargaining agreement." *Ackerman*, 860 F.2d at 1517. The key difference between these cases and the Michigan HCRA, however, is that the Oregon and California statutes *require* accommodation. Thus, accommodation is a *non-negotiable* right under Oregon and California law. Under the doctrine of parallelism, the state-law claim is not preempted because it is unnecessary to interpret the collective bargaining agreement—the right is provided by statute regardless of what the agreement may or may not provide.

Lastly, the majority cites a number of federal district court cases for the proposition that "§ 301 or federal labor law [does not] preempt[ ] a state handicap claim." Majority Opinion

at 17-18. The cited cases neither undermine, nor are they in conflict with, my position. Plaintiffs' claims in those cases were not preempted because they were not dependent on interpreting the collective bargaining agreement. *See, e.g., Turk v. General Motors Corp.*, 637 F. Supp. 739, 740 n.1 (E.D. Mich. 1986) ("plaintiff's claims here do not in any way depend upon an interpretation of the collective bargaining agreement"); *Nolte v. Blue Cross Blue Shield of Michigan*, 651 F. Supp. 576, 577 (plaintiff's HCRA claim not "inextricably intertwined with consideration of the terms of the labor contract"); *Austin v. New England Telephone and Telegraph Co.*, 644 F. Supp. 763, 768 (D. Mass. 1986) ("Here, none of Austin's state claims appear from the complaint to arise as a consequence of rights created in the collective bargaining agreement."). As the Court explains in *Nolte*, the analysis of whether rights are inextricably intertwined with the terms of the collective bargaining agreement "saves state civil rights laws, like [HCRA], from *wholesale* preemption." 651 F. Supp. at 577 (emphasis added).

Unlike the cases cited by the majority, Smolarek's and Fleming's claims to accommodation to other positions, regardless of the terminology used, derive solely from negotiable rights under the collective bargaining agreement. Such rights are not "independent of any right established by contract, [and are] inextricably intertwined with consideration of the terms of the labor contract," *Allis- Chalmers*, 471 U.S. at 213. The claims are therefore preempted under § 301.

IV.

Smolarek & Fleming v. Chrysler sets an overbroad precedent against finding § 301 preemption when the collective bargaining agreement is clearly implicated. The danger is clear:

> [A]s we explained in *Lueck*, "[t]he need to preserve the effectiveness of arbitration was one of the

> central reasons that underlay the Court's holding in *Lucas Flour*." 471 U.S., at 219. "A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, . . . as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." [citations omitted]. Today's decision should make clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements.

Lingle, 108 S. Ct. at 1884 (footnote omitted).

I would AFFIRM the District Courts' finding of preemption to the extent that plaintiffs request reinstatement to other positions, and would REMAND the cases to the District Court on the issue of whether to retain the remaining pendent state-law claims.

Appendix B

Nos. 86-2074/87-1387

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STANLEY SMOLAREK (86-2074),
RALPH FLEMING (87-1387),
Plaintiffs-Appellants,

ORDER

v.

CHRYSLER CORPORATION, ETC., ET AL.,
Defendants-Appellees

BEFORE: ENGEL, Chief Judge, KEITH, MERRITT, KENNEDY, MARTIN, JONES, KRUPANSKY, WELLFORD, MILBURN, GUY, NELSON, RYAN, BOGGS and NORRIS, Circuit Judges

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this Court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT
(s) Leonard Green, *Clerk*

Appendix C

Nos. 86-2074/87-1387

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STANLEY SMOLAREK,
Plaintiff-Appellant,
(86-2074)

v.

CHRYSLER CORPORATION,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

RALPH FLEMING,
Plaintiff-Appellant,
(87-1387)

v.

CHRYSLER CORPORATION, a Delaware Corporation; LOUIS EBALDI and LYNDON VERLYNDON, jointly and severally,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed October 3, 1988

Before: WELLFORD and NELSON, Circuit Judges; and PECK, Senior Circuit Judge.

Appendix C

Smolarek, et al. v. *Chrysler Corp.* *Nos. 86-2074/87-1387*

PER CURIAM. These combined cases present close and difficult questions regarding whether § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts plaintiffs' actions claiming violations of Michigan's Handicappers' Civil Rights Act, M.C.L. § 37.1101 *et seq.* (HCRA), and retaliatory discharge in violation of public policy relating to the filing of workers' compensation claims. In each case the district court found plaintiff's state cause of action preempted by § 301 and dismissed the suit for failure to exhaust remedies. The Supreme Court's recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*, _____ U.S. _____, 108 S. Ct. 1877 (1988), holding that an action under Illinois law for the tort of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301, guides our decision in these cases.

SMOLAREK

Smolarek was employed by Chrysler from 1953 until his lay off in 1984, and was a member of the UAW.[1] Since an injury in 1955, Smolarek has suffered from a seizure disorder, which normally has been controlled by medications. In October 1984, he suffered a seizure at work and was absent from work for the following two weeks. When he returned to work, he was informed that no jobs consistent with the medical restrictions he had worked with since 1955 were available. In 1985 Smolarek again attempted to return to work and was told no work was available within his restrictions. Plaintiff alleges that at this time his foreman made the comment, "Stan, what if you fall down and other people in the plant see you and you are having a seizure. The other people could have a heart attack."

In April 1986, Smolarek filed a two count complaint in Michigan state court alleging discrimination under the HCRA

[1] The UAW has filed an amicus curiae brief in the *Smolarek* appeal arguing for reversal of the district court's judgment.

and workers' compensation retaliation. He claimed that Chrysler discriminated against him by refusing to return him to his former position based on a handicap unrelated to his ability to perform his job duties, and that Chrysler also refused to reinstate him based on its fear that he might injure himself during a seizure on the job and file a workers' compensation claim. Smolarek did not allege any violation of the collective bargaining agreement between the UAW and Chrysler.

Chrysler removed the case to federal district court claiming federal question jurisdiction. Smolarek filed a motion to remand, which the district court denied on the grounds that § 301 preempted Smolarek's claims. The district court then dismissed Smolarek's action because he had failed to exhaust his intra-union remedies before filing a § 301 action. Smolarek now appeals the district court's denial of his motion to remand solely on the handicap discrimination issue.

FLEMING

Chrysler hired Fleming, also a UAW member, in 1976 as a painter-glazer. In August 1984, Fleming was injured while leaving the Chrysler plant where he worked, and as a result suffered some loss of balance, severe headaches, muscle spasms in his back, and vomiting. Fleming continued to work with some medical restrictions on the types of tasks he could perform. Fleming claims that following his injury he was given job assignments inconsistent with his limitations. Fleming further contends that this "harassment" increased when he expressed his intent to file a workers' compensation claim. In October 1984, Fleming was laid off indefinitely. Chrysler claims his lay off was due to lack of work, as allowed by the collective bargaining agreement. Fleming claims that, while technically on lay off, he was told he was being dismissed.

In December 1984, Fleming grieved his lay off. This grievance was pursued to the third step of a four-step grievance procedure before Fleming voluntarily terminated hs employment in May 1986 by relinquishing his recall rights as part of a settlement of his workers' compensation claim filed in February 1985.

Fleming filed a complaint in state court in July 1985, alleging violation of HCRA, discharge in retaliation for expressed intent to file a workers' compensation claim, breach of implied duty of good faith and fair dealing, and intentional interference with his quiet and peaceful pursuit of a lawful occupation. In August 1985, Chrysler removed the suit to federal district court. In October 1985, the district court denied Fleming's motion to remand on the grounds that the latter two counts of Fleming's complaint conferred original jurisdiction on the federal court.

Chrysler then filed a motion for summary judgment arguing that Fleming's claims were preeempted by §301. Finding that all of Fleming's claims were preempted, the district court granted the motion and dismissed the case. Fleming appeals this dismissal only with regard to the HCRA and retaliatory discharge claims.

Removal and § 301 Preemption

Ordinarily, the question of removability to federal court under 28 U.S.C. § 1441 turns upon application of the "well-pleaded complaint rule." Federal jurisdiction exists only when a plaintiff's properly pleaded complaint presents a federal question on its face. *Caterpillar, Inc. v. Williams,* 107 S. Ct. 2425, 2429 (1987). In the context of employment-related actions, however, a claim purportedly based solely on state law may be removable because § 301 of the LMRA has preempted that area of state law. In other words, "any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.* at 2430. Thus, in the cases

we now consider, the issues of federal preemption and removability largely merge; we must focus on whether plaintiffs' state-law claims are preempted by § 301 so as to place them within the scope of the "complete preemption" corollary to the well-pleaded complaint rule.

In a series of cases, the Supreme Court has made clear that § 301 of the LMRA preempts any state-law claim arising from a breach of a collective bargaining agreement. *See Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985); *Local 174, Teamsters, Chauffeurs, Warehousemen, & Helpers of America v. Lucas Flour Co.,* 369 U.S. 95 (1962); *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957); *see also Lingle v. Norge Division of Magic Chef, Inc.,* 108 S. Ct. 1877 (1988). The purpose of this rule is to require that all claims raising issues of labor contract interpretation be decided according to the precepts of federal labor law in order to prevent inconsistent interpretations of the substantive provisions of collective bargaining agreements. *Lucas Flour,* 369 U.S. at 103.

> Thus, *Lueck* faithfully applied the principle of § 301 preemption developed in *Lucas Flour,* if the resolution of a state-law claim depends upoon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute.

Lingle, 108 S. Ct. at 1881 (footnotes omitted).

In *Allis-Chalmers v. Lueck,* the Court expanded the preemptive reach of § 301 to state-law tort claims. In *Lueck* the Court considered whether a state-law cause of action for bad faith handling of an insurance claim was preempterd because the insurance plan provisions were included in a collective bargaining

agreement. The Court found the state claim was preempted because an essential element of the tort (*i.e.*, bad faith handling) required interpretation of the labor agreement regarding whether the plaintiff was due payments. Because the duty claimed to have been breached "derive[d] from the rights and obligations established by the contract," the Court reasoned that "any attempt to assess liability here inevitably will involve contract interpretation." *Id.* at 217, 218.

Although the Court limited its holding in *Lueck* to the specific facts of that case and made clear that not "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement . . . necessarily is pre-empted by § 301," *id.* at 220, the Court did attempt to define the preemptive scope of § 301:

> Our analysis must focus, then, on whether the [state-law cause of action] confers non-negotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state-law] claim is inextricably intertwined with consideration of the terms of the labor contract.

Id. at 213.

In its recent decision addressing asserted § 301 preemption of state-law claims, the Supreme Court has attempted to clarify its language in *Lueck* regarding what kind of "independence" of state-law actions from collective bargaining agreements permits a finding of non-preemption. In *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988), the Court held that a unionized employee's state-law action based on Illinois' tort of retaliatory discharge for filing a workers' compensation claim was not preempted by § 301 because "the state-law remedy . . . is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: *resolution of the state-law claim does not require construing the*

collective-bargaining agreement." 108 S. Ct. at 1882 (emphasis added) (footnote omitted). In so concluding, the Court rejected the contentions of the employer that the retaliatory discharge action was not independent because resolution of the state-law claim would implicate the same factual analysis as would a grievance brought under the CBA's "just cause" provision. *Id.* Thus, *Lingle* stands as the Court's latest word on § 301's preemptive scope and, as such, will guide our decision in these cases.

The Workers' Compensation/Retaliatory Discharge Claim

Fleming filed a state-law suit claiming that he was effectively discharged (technically, he was laid off) because of his expressed intention to file a workers' compensation claim. The district court found that Fleming's state-law claim was preempted by § 301, and Chrysler argues that this decision was correct because the retaliatory discharge claim is inextricably intertwined with the terms of the collective bargaining agreement.

Fleming's claim is essentially the same as the claim that the Court addressed in *Lingle.* In order for a plaintiff to show retaliatory discharge under Michigan law, he must demonstrate that he was discharged by his employer in retaliation for the filing of a lawful claim for workers' compensation. *See Sventko v. Kroger Co.,* 69 Mich. App. 644, 245 N.W.2d 151, 154 (1976). As the Court reasoned in *Lingle:* "Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." 108 S. Ct. at 1882. Consequently, here, as in *Lingle,* the state-law tort of retaliatory discharge creates rights independent of those established by the collective bargaining agreement and hence is not preempted by § 301. Accordingly, we conclude that the district court erred in finding § 301 preemption with regard to Fleming's retaliatory discharge claim.

The Handicap Discrimination Claims

Smolarek and Fleming make the following argument against preemption of their handicap discrimination (HCRA) claims: The rights created by HCRA are in addition to and independent of any rights created by the UAW-Chrysler collective bargaining agreement. They argue that these rights exist regardless of the terms of the collective bargaining agreement and apply equally to union and nonunion employees. Furthermore, they assert that the individual rights established by HCRA are the type of "nonnegotiable" rights that *Lueck* exempted from § 301 preemption and that cannot be bargained away by a collective bargaining unit. In summary, plaintiffs contend that success on the HCRA claim is not contingent on showing that any provision of the collective bargaining agreement was breached; therefore, the federal policy concern regarding interpretive uniformity is not implicated in these cases as set out in *Lingle*.

Chrysler counters these arguments by asserting that in these particular cases, evaluation of plaintiffs' HCRA claims will require consideration of collective bargaining agreement terms. The HCRA provisions applicable to Smolarek's and Fleming's claims require that an employer not "[d]ischarge or otherwise discriminate against an individual with respect to . . . the *terms, conditions, or privileges of employment,*" or "[l]imit, segregate, or classify an employee . . . in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." M.C.L. § 37.1202(1)(b), (c) (emphasis supplied). Thus, Chrysler asserts that, in the case of a union employee, the HCRA itself requires reference to the "terms, conditions, and privileges of employment" — matters defined by the collective bargaining agreement. Finally, Chrysler argues that to allow union employees to pursue this type of

HCRA claim could disrupt and/or bypass the collective bargaining process and grievance procedures.

The Supreme Court in *Lingle* approved, in dicta, the Seventh Circuit's recognition that "§ 301 does not preempt state anti-discrimination laws, even though a suit under these laws, like a suit alleging retaliatory discharge, requires a state court to determine whether just cause existed to justify the discharge." 108 S. Ct. at 1885 (quoting *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031, 1046 n.17 (7th Cir. 1987)). The Court went on to note that "the mere fact that a broad contractual protection against discriminatory—or retaliatory—discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract." *Id.* Chrysler, however, seeks to distinguish HCRA from other state anti-discrimination statutes in that HCRA expressly recognizes that some handicaps are related to job performance and does not purport to protect persons with those handicaps. *See Carr v. General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686, *amended by* 426 Mich. 1231, 393 N.W.2d (1986).

(1) ***Smolarek's HCRA Claim***

On appeal from the district court's order denying his motion for remand, Smolarek specifically argues that Chrysler violated its duties under HCRA by refusing to return him "to his former position or another position consistent with his medical restrictions and has maintained [him] instead on a disability lay off indefinitely." Chrysler responds that this state-law claim is "substantially dependent" on interpretation of the collective bargaining agreement's provisions regarding an employee's right to reinstatement following disability leave and characterizes Smolarek's claim as asserting a breach of ¶ 53 of the collective bargaining agreement, entitled "Reinstatement after Disability."

Under HCRA, an employee has the initial burden of proving that the employer violated the Act. *Gloss v. General Motors Corp.*, 138 Mich. App. 281, 360 N.W.2d 596, 598 (1984). Smolarek might carry this burden by demonstrating that Chrysler had refused to reinstate him following his disability leave *because of* his seizure disorder. *See id.* The fact that the collective bargaining agreement contains a provision regarding reinstatement does not compel a finding of § 301 preemption. This is not a case in which the duty claimed to have been breached (*i.e.*, the duty not to discriminate) arises solely from the collective bargaining agreement. *Cf. International Brotherhood of Electrical Workers v. Hechler,* 107 S. Ct. 2161 (1987) (union's duty to provide safe workplace derived solely from collective bargaining agreement). Nor is this a case in which evaluation of Chrysler's prima facie liability will require determination of whether the collective bargaining agreement has been breached. *Cf. Lueck,* 471 U.S. 202.

Chrysler may, in its own defense, assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement and therefore was not based on Smolarek's handicap. The assertion of a defense requiring application of federal law, however, does not support removal to federal court:

> It is true that when a defense to a state claim is based on the terms of a collective-bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. ***But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule*** — that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

Caterpillar, 107 S. Ct. at 2433 (emphasis added).

We find that Smolarek's complaint pleaded a cause of action based solely on Michigan's HCRA, a statute that *Lingle* suggests has not been completely preempted by § 301. Accordingly, we conclude that the district court erred in denying Smolarek's motion for remand to state court. As the Supreme Court noted in *Caterpillar,* although the state court may need to determine whether § 301 preempts Smolarek's claim in light of Chrysler's defense based on the collective bargaining agreement, this court need not consider that issue.[2] *Id.* at 2433 n.13. It is sufficient that we find that Smolarek's well-pleaded complaint did not arise under federal law or under the collective bargaining agreement.

(2) *Fleming's HCRA Claim*

In contrast to Smolarek's appeal from an order denying remand, Fleming appeals directly from the district court's decision finding § 301 preemption of Fleming's HCRA and retaliatory discharge claims. Therefore, we must consider the preemption issue, whether raised in Fleming's complaint or by Chrysler's defenses.

Fleming asserted in his complaint that Chrysler violated HCRA by failing to provide him with work consistent with his medical restrictions and by effectually terminating him because of his handicap. To establish prima facie liability under the Act, he must demonstrate (1) that Chrysler took adverse employment actions against him and (2) that the actions were motivated by his handicap. As in *Lingle,* these are "purely factual questions" relating to the conduct and motivation of the employer. "Neither of the elements requires a court to interpret any term of a collective-bargaining agreement." 108 S. Ct. at 1882.

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[2] Our conclusion that Fleming's HCRA claim is not preempted by § 301, *infra,* however, suggests, but does not compel, the conclusion that a state court considering the issue in Smolarek's case might reach.

To defend against the HCRA charge, Chrysler must show that its actions were motivated by some factor other than Fleming's handicap. We recognize that Chrysler is likely to assert as its defense to Fleming's claim that it based its actions on the provisions of the labor agreement regarding reinstatement and accommodation. Even this defense, however, does not require a finding of preemption. In order to resolve the HCRA claim in light of this defense, a court need only decide whether Chrysler took actions adverse to Smolarek because of his handicap or solely because Chrysler felt bound by the union agreement to take the actions. It is *not* necessary to decide whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: What was Chrysler's motivation? Under *Lingle*, therefore, Fleming's HCRA claim is sufficiently "independent" of the collective bargaining agreement to escape § 301 preemption, for "resolution of the state-law claim does not *require* construing the collective-bargaining agreement." 108 S. Ct. at 1882 (emphasis added) (footnote omitted). Accordingly, we conclude under our understanding of *Lingle* that the district court erred in finding Fleming's HCRA claim preempted by § 301.[3]

In sum, we hold that because resolution of neither Fleming's retaliatory discharge claim nor his handicap discrimination claim would necessitate interpretation of a collective bargaining agree-

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[3]This conclusion is not inconsistent with our decision in *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733 (6th Cir. 1985). There we found that an employee's claim for damages against his union for breach of the union's duty of fair representation, brought pursuant to a provision of Michigan's HCRA, was preempted by § 301. The holding in *Maynard* was based on the fact that the HCRA fair representation provision "created no new rights for an employee and imposed no duty on a union not already clearly present under existing federal labor law." *Id.* at 735. Unlike the fair representation duty considered in *Maynard*, however, the duty not to discriminate based on handicap is not a duty already existing in the federal labor law. Therefore, the concerns regarding interpretative consistency that *Maynard* raised are not present in the instant appeal.

ment, those claims are not preempted by § 301. The judgment of the district court in Fleming's case is accordingly **REVERSED,** and the matter **REMANDED** for further proceedings. We further find that because Smolarek's complaint asserted solely a violation of Michigan's HCRA and presented no question of federal law, removal to federal court was improper in this case, and the district court erred in denying Smolarek's motion to remand. The order of the district court denying remand is **REVERSED,** and the case is ordered **REMANDED** to Michigan state court.

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STANLEY SMOLAREK
Plaintiff

v.

CHRYSLER CORPORATION,
Defendant

Civil Action
No. 86-71763

HON. JULIAN ABELE
COOK, JR.

ORDER

The Plaintiff, Stanley Smolarek ("Smolarek"), filed a two count Complaint against the Defendant, Chrysler Corporation ("Chrysler"), in a state court. Count I alleged a violation of Michigan's Handicappers' Civil Rights Act. 37 MCLA § 37.101 *et seq.* Count II alleged a violation of Michigan's public policy against the retaliatory firing of Smolarek for his earlier filing of a worker's compensation claim against Chrysler. Both counts arose out of Chrysler's alleged refusal to return Smolarek to work after he had suffered a seizure on the job.

Chrysler removed the matter from the state court, claiming that this Court has original jurisdiction pursuant to 29 U.S.C. § 185 and 28 U.S.C. §§ 1331 and 1337. Thus, according to Chrysler, removal was proper under 28 U.S.C § 1441(b).

Smolarek disagrees with Chrysler and now seeks a remand of the matter to state court. Smolarek contends that his case will not involve an application or interpretation of the collective bargaining agreement since he does not seek to enforce any right that may arise under that contract. As a result, he argues that his state actions are not preempted by the National Labor Relations Act, 29 U.S.C. § 151.

In response, Chrysler contends that Smolarek's rights to reinstatement from disability are derived exclusively from his collective bargaining agreement, and as such, his claims are preempted by § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Thus, Chrysler asserts that any other conclusion would allow Smolarek to undermine federal labor policy by purposefully failing to plead a necessary federal question.

The question presented for consideration by this Court is whether Smolarek's causes of action are preempted by § 301 of the LMRA. The seminal case on this question is *Allis-Chalmers v. Lueck*, 105 S.Ct. 1904 (1985). According to *Lueck*, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301 or other provisions of the federal labor law." *Id.* at 1911. Instead, the preemptive effect of § 301 extends only to "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement." 105 S.Ct. at 1911. "Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements." *Id.* at 1912. Conversely, state-law rights and obligations that are independent of the labor contract, and, therefore, proscribe non-negotiable conduct or establish non-negotiable rights or obligations are not preempted by § 301. Consequently, under *Lueck*, the question becomes whether the state law rights and obligations, which have been asserted by Smolarek, are non-negotiable state law rights and obligations that are inextricably intertwined with consideration of the terms of the labor contract. *See id.* at 1912.

Chrysler believes that Smolarek's cases of action are inextricably intertwined with his labor contact. In support of its position, Chrysler contends that this case is analogous to several other cases. For example, Chrysler believes that the instant case is analogous to *Maynard v. Revere Copper Products, Inc.*, 773 F.2d

733 (6th Cir. 1985). In *Maynard,* the Sixth Circuit Court of Appeals held that a claim of unfair representation against a union and an employer under § 37.1204(d) of Michigan's Handicappers' Civil Rights Act was preempted by § 301 because "[t]he duty of fair representation is a federally created statutory duty and federal law 'governs' a cause of action for breach of that duty." *Maynard,* 773 F.2d at 735. However, Smolarek has not alleged a breach of the duty of fair representation. Hence, *Maynard* is not analogous.

Chrysler also believes that *Butynski v. General Motors Corporation,* No. 85-60454-AA (E.D. Mich. March 12, 1986); *Cole v. General Motors Corporation, et al,* No. G83-408CA (W.D. Mich. October 22, 1984); *Curry v. General Motors Corporation,* No. 85-C1938 (E.D. Ill. October 11, 1985); *Jasmund v. Chrysler Corporation, et al,* No. 85-CB-73586-DT (E.D. Mich. November 7, 1985); and *Fleming v. Chrysler Corporation, et al,* No. 85-CV-73803-DT (E.D. Mich. October 7, 1985) are also analagous.

The "well pleaded complaint rule" instructs this Court that Smolark is the master of his complaint and, therefore, he usually determines the law upon which he relies in advancing his causes of action. *Franchise Tax Board v. Construction Laborers Vacation Trust,* _____ U.S. _____, 103 S.Ct. 2841, 2853 (1983). The "artful pleading rule," however, precludes Smolarek from avoiding removal to this Court by inadvertently, mistakenly, or fraudulently failing to plead a federal question. *Schaeffer v. General Motors Corp.,* 586 F. Supp. 870, 872 (E.D. Mich. 1984). Since the "artful pleading" rule is a necessary collorary of the "well pleaded complaint rule," *Franchise Tax Board,* _____ U.S. _____, 103 S.Ct. at 2853, this Court must determine whether a federal question would necessarily have appeared if Smolarek's complaint had been well pleaded. Without expressing any comment on the analogous nature of Chrysler's persuasive authority, this Court believes that Smolarek's causes of action are preempted by § 301.

Appendix D

In pertinent part, Smolarek asks this Court to impose the following restrictions and obligations upon Chrysler on the basis of the Michigan Handicappers' Civil Rights Act:

> a) refrain from discriminating against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position;
>
> b) refrain from limiting, segregating, or classifying an employee in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely effect the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position;
>
> c) refrain from taking discriminatory action against an individual on the basis of physical examinations that are not directly related to the requirements of the specific jobs;
>
> d) accommodate plaintiff's handicap by providing him with work which would fit his particular needs or handicap and otherwise accommodate plaintiff so that he can remain in the active employ of defendant.

Smolarek's Complaint also made the following request on the basis of the Michigan Worker's Disability Compensation Act:

> (a) to [preclude Chrysler] from discriminating or otherwise retaliating against its employees in general and plaintiff in particular in anticipation of such employee making a claim against defendant. . .

Obviously, those duties are based upon the labor contract because they are derived from rights and obligations established by the contract. For example, they depend upon Smolarek's terms, conditions, and privileges of employment that are addressed in the labor contract. They depend upon employment classifications, limitations, and segregations that are covered by the collective

bargaining agreement. They depend upon physical examinations and availability of employment, both of which are dependent upon the collective bargaining agreement. They depend upon the validity of Chrysler's rationale for considering Smolarek unemployable, which also is a right that was established by the collective bargaining agreement.

Because the rights and duties which have been asserted by Smolarek are derived from his collective bargaining contract, any disposition of his causes of action will necessarily involve an interpretation of the labor contract. Consequently, Smolarek's claims are "inextricably intertwined" with that contract. *Lueck*, 105 S.Ct. at 1912. This Court, therefore, holds that § 301 of the LMRA preempts Smolarek's causes of action. Accordingly, Smolarek's Motion to Remand is denied.

IT IS SO ORDERED.

(s) JULIAN ABELE COOK, JR.
United States District Judge

Dated: September ???
Detroit, Michigan

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STANLEY SMOLAREK
Plaintiff,

v.

CHRYSLER CORPORATION,
Defendant.

C.A. No. 86CV71763DT
Honorable Julian Abele Cook, Jr.

ORDER OF DISMISSAL WITH PREJUDICE

At a session of said Court, held in the Federal Building, Detroit, Michigan
ON: October 24, 1986

PRESENT: HONORABLE JULIAN ABELE COOK, JR.
United States District Judge

Upon the reading and filing of the attached stipulation, and the Court being fully advised in the premises,

IT IS ORDERED that Stanley Smolark's action against Chrysler Motors Corporation f/k/a Chrysler Corporation is hereby dismissed with prejudice and without costs or attorney fees because Plaintiff did not exhaust his internal union appeals.

(s) JULIAN ABELE COOK, JR.
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RALPH FLEMING,
Plaintiff.

v.

CHRYSLER CORPORATION, a Delaware corporation LOUIS EBALDI and LYNDON VERLYNDON, Jointly and Severally,
Defendants.

CASE NO. 85-CV-73803-DT

HON. BARBARA K. HACKETT

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is presently before the court on defendant's motion for summary judgment on the remaining counts in plaintiff's complaint. For the reasons set forth below, defendant's motion is granted.

FACTS

Plaintiff was hired by defendant Chrysler Corporation ("Chrysler") in September, 1976. He worked as a painter/glazer at Chrysler until he was laid off on October 19, 1984. Throughout his employment at Chrysler, plaintiff was a member of the International Union, UAW. Defendants Louis Ebaldi and Lyndon Verlyndon were plaintiff's supervisors.

Plaintiff has asserted that he was afflicted with a physical condition that precluded him from performing his assigned duties. He therefore asked that Chrysler make certain provisions for his

physical limitations. Appparently he had been involved on August 31, 1984, in an automobile accident, as a result of which he suffered repeated episodes of vomiting that lasted from two to seven days. He asked UAW officials to discuss with Chrysler the possibility of placing work restrictions on plaintiff's assignments.

On October 19, 1984, plaintiff was placed on indefinite layoff in a reduction in force at Chrysler's Detroit Forge Plant. Plaintiff characterizes his indefinite layoff as a discharge. Defendant maintains, however, that plaintiff retained all of his recall rights under Chrysler's collective bargaining agreement ("CBA") with the UAW, until he signed a release and waiver of seniority on May 15, 1986, pursuant to a settlement of a workers' compensation claim he filed on February 21, 1986.

On July 29, 1985, plaintiff filed the instant lawsuit, alleging that his indefinite layoff and Chrysler's failure to make provisions for his physical condition constituted handicap discrimination, retaliatory discharge, breach of an implied duty of good faith and fair dealing, and intentional interference with his pursuit of his occupation.

Plaintiff initially took his dispute with Chrysler to the UAW, which filed a grievance on his behalf asserting that his layoff was improper. This grievance was processed through the first three steps of the grievance procedure and was pending at the fourth step when plaintiff voluntarily quit his employment. Plaintiff instituted the present action without having exhausted all available union grievance procedures. Chrysler removed plaintiff's suit to this court, alleging that at least some, if not all, of plaintiff's claims constitute claims under § 301 of the Labor Management Relations Act ("LMRA"). Plaintiff's subsequent motion to remand to state court was denied in an order issued by Judge LaPlata on October 5, 1985. Judge LaPlata ruled at that time that plaintiff's claims of breach of an implied duty of good faith and interference with pursuit of his occupation arise under § 301.

Appendix E

DISCUSSION

This court has previously applied the artful pleading rule in similar actions. In *Butynski v. General Motors Corporation,* No. 85-CV-60454-AA (E.D. Mich., March 12, 1986, Joiner, J.) the plaintiff alleged that her complaint referred only to the Michigan Handicappers Civil Rights Act and not to any provision of federal law. She argued that removal was therefore improper. The court disagreed. It held that since plaintiff had raised issues of job assignment and seniority in her complaint - subjects covered by the collective bargaining agreement - plaintiff's suit fell under § 301 of the LMRA. The court refused to allow "artful pleading" to prevent removal of a claim properly covered by the labor statute.

In the present case, although plaintiff fails to refer in his complaint to the CBA between Chrysler and the UAW, the complaint is replete with references to issues covered by the CBA. To the extent that a subject is governed by the CBA, the CBA must necessarily preempt state law, in order to achieve the intent of the LMRA to achieve uniform interpretation of collective bargaining agreements. *Allis-Chalmers Corporation v Lueck,* 105 S.Ct. 1904 (1985).

Recent opinions of the Court of Appeals for the Sixth Circuit confirm prior decisions in this District. In *Stephens v. Norfolk & Western R. Co.,* 792 F.2d 576 (6th Cir. 1986), the Court of Appeals invoked the following test to determine whether a railroad employee, who had been disqualified from work following diagnosis of degenerative disease in his lower back, could bring a cause of action under the Michigan Handicappers Civil Rights Act:

> If the "action is based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and the [Railway Labor Act]", exclusive jurisdiction of the [National Railroad Adjustment Board] preempts the action.

792 F.2d 576 at 580. The court rejected Stephens' claim under the Handicappers Act, having found that the collective bargaining agreement covered aspects of the work relationship between the railroad and its employees, including the employer's right to set physical qualifications for its employees.

In the present case, a supplement to the CBA between Chrysler and the UAW, dated November 5, 1976, specifically addresses assignment of jobs in consideration of physical limitations. (See Defendant's motion, Exhibit 4). Provisions for layoff, reduction in force and subsequent seniority rights are set forth in the body of the CBA, Sections 58-66 (see Defendant's motion, Exhibit 3). Because plaintiff's discrimination claim arises out of subject matter included in the CBA and supplements thereto, it is preempted by federal labor law.

Similarly, plaintiff's retaliatory discharge claim is preempted as it is also "inextricably intertwined" with the provisions of the CBA governing discharge and appeal from discharge (see Defendant's motion, Exhibit 2). See *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985), *Stephens* and *Butynski, supra.*

In sum, this court finds that plaintiff's remaining claims are subject to the collective bargaining agreement between his union and his employer, and are, therefore, preempted by the Labor Relations Act, 29 U.S.C. § 1985. Accordingly,

IT IS ORDERED that defendant's motion for summary judgment is granted.

(s) BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: March 10, 1987

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RALPH FLEMING,
Plaintiff,

v.

CHRYSLER CORPORATION, a Delaware corporation
LOUIS EBALDI and LYNDON VERLYNDON, Jointly and Severally,
Defendants.

CASE NO. 85-CV-73803-DT
HON. BARBARA K. HACKETT

JUDGMENT OF DISMISSAL

The court, having reviewed and considered defendant's motion for summary judgment and plaintiff's response thereto, has granted defendant's motion in a memorandum opinion and order entered on this date.

Accordingly, this court orders the entry of a judgment of dismissal as required by F.R.Civ.P. 58. Therefore a judgment of dismissal is hereby entered in this case.

(s) BARBARA K. HACKETT
UNITED STATES DISTRICT JUDGE

Dated: March 10, 1987

Appendix F

RULE 28.1 STATEMENT

The following is a listing of subsidiaries (except wholly-owned subsidiaries) and affiliates of petitioner Chrysler Corporation:

SUBSIDIARIES:

Chrysler de Mexico S.A.
Aire y Temperatura S.A.
Jeep Africa, Ltd.
Chrysler Comercial, S.A. de C.V.
Chrysler Life Insurance Company of Canada

AFFILIATES:

Arab American Vehicles Company
Automation Technologies Products
Beijing Jeep Corpration, Ltd.
CFC/GECC (New York) Associates II
Chrysler Japan Sales Limited
CSM & Co.
Diamond-Star Motors Corporation
Eagle Associates
Ensambladora Carabobo, C.A.
F.F. Developments Limited
Genigraphics Corporation
Highland Park Development Corporation
Mahindra & Mahindra, Ltd.
Manufacturers Hanover Asia, Limited
Mitsubishi Motors Corporation
Officine Alfieri Maserti S.p.A.
Onset Bidco, Inc.
Pinnacle Partners
Rambler Motors (AMC) Limited
Star Group IE Geothermal Partners
Star Group Stillwater Geothermal Partners
Synektron Corporation
Trico Marine Operators, Inc.
Valeo/Acustar Thermal Systems, Inc.

89-568

No.

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

CHRYSLER CORPORATION, ET AL

PETITIONERS

v.

STANLEY SMOLAREK AND RALPH FLEMING,

RESPONDENTS

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CHRYSLER CORPORATION, ET AL

PETITIONERS

v.

STANLEY SMOLAREK AND RALPH FLEMING,

RESPONDENTS

==========

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Stanley Smolarek responds to the petition of Chrysler Corporation, Louis Eovaldi, and Lyndon Verlyndon for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

1.) Smolarek's Claim

On April 1, 1986, Smolarek filed a two count Complaint arising under state law against Chrysler in Michigan's Wayne County Circuit Court alleging discrimination under Michigan's Handicappers Civil Rights Act, plus workers' compensation retaliation. (App. A, infra, 1a-5a). Smolarek had become employed with Chrysler in 1953, and remained in Chrysler's employ until his lay off in October 1984. (App. B, infra, 6a) In 1955, Smolarek suffered a work-related injury which left him with a seizure disorder controlled by medication. From 1955 to 1984, he worked for Chrysler at a job that was compatible with medical restrictions stemming from the injury. (App. B, infra, 6a).

Smolarek did, however, suffer a seizure at work on October 8, 1984. He took 2 weeks off without any change in his job status, e.g. placement on medical leave of absence, and then Chrysler's medical department cleared Smolarek to return to work with the same restrictions he had worked with since 1955. (App. B,

infra, 6a-7a). Smolarek then reported to his foreman for placement, but was informed that no work was available within his restrictions, even though Smolarek had reason to believe that his job was still available. (App. B, infra, 7a).

A second attempt by Smolarek to return to work in 1985 produced similar results. This time, Chrysler's foreman indicated his reason for refusing to return plaintiff to his former position: "Stan, what if you fall down and other people in the plant see you and you are having a seizure. The other people could have a heart attack." (App. B, infra, 7a).

In his Complaint, Smolarek alleged that Chrysler, in refusing to return Smolarek to his position, violated its duty under the Handicappers' Civil Rights Act to refrain from discriminating against an employee because of a handicap that is unrelated to the employee's ability to do his job.[1] (App. A, infra,

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[1] Smolarek also alleged that Chrysler had violated the MHCRA by refusing to accommodate Smolarek by returning him to other work compatible with his restrictions. (In other words,

2a-3a)

Smolarek also alleged that Chrysler refused to return him to work because Chrysler feared unduly that Smolarek

---

work other than his former position). Subsequent to the filing of the Complaint, the Michigan Court of Appeals held that the accommodation provisions of the MHCRA, MCL 37.1102(2); MSA 3.550(102)(2), did not extend to placement in a new job. Rancour v Detroit Edison, 150 Mich App, 276 (1986). Given this interpretation of the accommodation section, Smolarek could not have prevailed in state court on his Complaint to the extent that he sought accommodation to another position. For this reason, Smolarek indicated at oral argument in the Court below that, in the event of a ruling of no preemption, Smolarek's claim in state court would be limited to reinstatement to his former position (plus damages), and not a claim for reinstatement to another position compatible with his restrictions.

In this connection, Smolarek has no quarrel with the general proposition that issues of removal and preemption are determined with reference to the plaintiff's Complaint. But where there has been a change in the law subsequent to the filing of a complaint which would preclude a portion of a cause of action affecting the removal/preemption analysis, the plaintiff should be permitted to abandon or disclaim that portion of his Complaint for purposes of such analysis, so long as the plaintiff is bound by the abandonment or disclaimer upon eventual remand to the trial court.

might re-injure himself and make a workers' disability compensation claim under Michigan's Workers' Disability Compensation Act. (App. A, infra, 3a) This claim has since been abandoned.[2]

In short, the essence of Smolarek's claim is that Chrysler refused Smolarek an opportunity to return to his former job because of unfounded perceptions that Chrysler had concerning: 1) the ability of handicapped employees to work; and 2) the hazards they supposedly present to themselves or others.

The fact that Smolarek is a union member and that certain terms and conditions of his employment are governed by a collective bargaining agreement is

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[2] In fact, with respect to the workers' compensation retaliation claim that Smolarek abandoned, it is clear that the Sixth Circuit accepted this abandonment in its removal/ preemption analysis. Interestingly, though Chrysler argues at page 19 of its Petition that Smolarek's disclaimer of a portion of his handicap claim is void for purposes of the removal/preemption analysis, Chrysler makes no such complaint about Smolarek's abandonment of the workers' compensation retaliation claim, undoubtedly because, under Lingle v Norge Div. of Magic Chef, 486 U.S.--, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), it would do Chrysler no good.

purely incidental to this case. Smolarek asserts no rights under the collective bargaining agreement. Section 53 of the collective bargaining agreement, which pertains to reinstatement following disability leave, cannot and does not apply where, as here, the employee is not placed on disability leave and both the employee and the company doctor are in complete agreement over the medical restrictions to be imposed.

Why then has Chrysler asserted this section of the CBA as the basis for its pre-emption argument? The answer is simple: Chrysler seeks to exempt itself from state employment legislation that it disfavors. There is a real risk that the CBA might be misused to impair unnecessarily an employee's state court remedies. As a consequence, the CBA becomes what is feared most: a pretext to disqualify, screen out, and eliminate those employees who, by virtue of their handicap status, are entitled to protected status.

It must be remembered that this case does not involve an issue of whether Smolarek's handicap is job related. There is no allegation by Chrysler that

in the exceedingly short time between Smolarek's seizure and his clearance to return to work the job duties or working conditions changed. There is no evidence that Smolarek could not return to the same job he performed previously or that Chrysler had exercised its prerogatives under the CBA to change its mode of operation or redefine Smolarek's job. If that were the case there would be room for Chrysler's argument that Section 53 would come into play to resolve a dispute as to whether Smolarek could actually perform the job in question given his medical restrictions. By artificially creating a dispute where none exists, Chrysler places itself in position to claim that the dispute resolution mechanism in Section 53 must govern to the exclusion of Smolarek's state court remedies. The absence of any such dispute proves the point being made here: the CBA is being used as an artifice to circumvent Smolarek's legislatively mandated parallel state remedies.

Perhaps the best evidence that Smolarek's state law claim presents no threat to the collective bargaining process is the fact that the Inter-

national Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) has stood shoulder-to-shoulder with Smolarek as an Amicus Curiae throughout the appellate process in opposition to the arguments of Chrysler.

2. The Sixth Circuit Decision

The dissent written by Judge Kennedy was a partial dissent and applied only to that portion of Respondents' Complaints that sought reinstatement to a position other than the ones they had held. In fact, the Sixth Circuit was unanimous in its conclusion that removal of Smolarek's claim was improper to the extent that Smolarek was seeking reinstatement to his original position. Given the fact that Smolarek abandons that portion of his MHCRA Complaint that seeks reinstatement to a position other than the one he held, the concern of Judge Kennedy and her fellow partial dissenters is alleviated.

REASONS FOR DENYING THE PETITION

1. THE SIXTH CIRCUIT EN BANC OPINION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

A. Smolarek's State Law Claim of Handicap Discrimination, As Well As The Defense To That Claim, Is Not Dependent On, Nor Does It Require Analysis Of The CBA.

1. Lingle v Norge Division of Magic Chef Looks To The Nature Of The Inquiry Necessary To Resolve The State Claim In Considering Whether Preemption Applies.

In Lingle v Norge Division of Magic Chef, 486 U.S. ___, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), a union employee sued her employer, alleging she was discharged in retaliation for filing a worker's compensation claim, a cause of action cognizable under state law. The applicable CBA provided her a contractual remedy for discharge without just cause. In a separate proceeding, plaintiff also took advantage of the CBA grievance procedure, and won reinstatement with back pay at arbitration. While the grievance procedure was pending, Lingle filed her state court action.

In a unanimous opinion holding that

the state claim was *not preempted by* §301, this Court noted that the issues raised by the state law claim did not require interpretation of the CBA:

> "[T]o show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights. Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement. Thus, the state-law remedy in this case is 'independent' of the collective bargaining agreement in the sense of 'independent' that matters for §301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement."

[citations and footnote omitted]

The fact that the unionized employee in Lingle used the CBA grievance procedure to resolve her dispute with the employer and at the same time was permitted by this Court to proceed to enforce her rights under state law is highly significant. It is clear that the possibility of inconsistent results, alone, is not enough to invoke pre-emption as a bar to this independent and parallel remedy.

This Court in Lingle went on to conclude that, even where a discharge may be lawful pursuant to a CBA but unlawful under a state anti-discrimination law, federal pre-emption does not apply so long as the state claim can be resolved without interpretation of the CBA. Lingle, 108 S.Ct. at 1885.

Below, we demonstrate unequivocally that Smolarek's state law claim for handicap discrimination involves purely factual questions regarding the conduct and motivation of Chrysler without any need for the interpretation of any CBA provisions.

2. Close Examination Of The Issues Necessary To Resolve Plaintiff's Discrimination Claim Makes It Clear That Interpretation Of The CBA Is Not Involved.

As this Court stated in Texas Department of Community Affairs v Burdine, 450 U.S. 248, 101 S. Ct. 1089 67 L.Ed. 207, (1981), the McDonnell-Douglass presumption-based proof scheme operates as follows:

1. Proof of a prima facie case by plaintiff.

2. Articulation by defendant of a legitimate non-discriminatory reason for the employment decision.

3. Proof by plaintiff that the articulated reason is not the true reason, but a pretext for discrimination. Burdine, 450 U.S. at 252-253.

The prima facie case of disparate treatment consists of evidence that the employee was qualified for an available position and was rejected under circumstances which give rise to an inference of discrimination. Here, Smolarek was ready and able to return to work at his regular job and was therefore qualified for that job at the time that the employment decision to deny him work

was made.[3]

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[3] Incidentally, the claim of Petitioner that Smolarek alleged in his Complaint that he was on a "disability leave" for two weeks (Petitioner's Brief at p.4) is misleading. Smolarek alleged that he was disabled for two weeks, but this is not to imply that he received formal recognition of a "disability leave" status pursuant to the CBA. Indeed, because Chrysler chose to include only a portion of the CBA in its contributions to the Joint Appendix in the Court below, portions which do not include any definition of what constitutes a disability leave, on this record there is simply no evidence that Smolarek's two week absence is a "disability leave" within the meaning of §53 of the CBA, or whether it was merely treated as any short term illness without formal recognition of a disability status. But even if we assume, arguendo, that Smolarek's two weeks off brings into play §53 of the CBA, an employer not motivated by discrimination would be expected to have taken Smolarek back to work at that time, because Smolarek had passed the required medical examination. But Smolarek was simply told that no jobs were available, a position that Smolarek had good reason to believe was false, i.e. a pretext.

Further, the fact that Smolarek was ready and able to return to work at his regular job at the time the employment decision at issue here was made renders inapposite Carr v General Motors, 425 Mich 313, 389 N.W.2d. 686 (1986), because, in that case, the challenged employment decision was made at a time when the employee's medical condition was

Chrysler's defense to the handicap discrimination claim will undoubtedly focus on its motivation: Chrysler will claim that it made the disputed employment decision on account of a provision in the CBA. Analysis of the CBA provision itself will not be necessary. Proof that such analysis is unnecessary is found in Burdine, supra:

> "The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the profferred reasons". [emphasis added]. Burdine, supra at 254.

In other words, Chrysler's mere articulation of the CBA as its motivation, without analysis of its terms, is sufficient to rebut the presumption of discrimination.

It will then be incumbent on Smolarek to demonstrate that the articulated reason for the employment

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affecting his ability to do his regular job.

decision is a pretext, either directly by persuading the Court that discrimination was more likely the motivation, or indirectly by showing that the employer's stated reason is not worthy of belief. Burdine, supra, at 256. This may be accomplished, for example, by evidence that the person making the decision had something other than the CBA in mind, such as an expressed, unfounded fear of the handicapped. (e.g. "What if you have a seizure, Stan? Others could see you and have a heart attack"). Clearly, Smolarek's pretext claim will not be advanced by quibbling with Chrysler over interpretation of the CBA. It is for this reason that Smolarek will accept any good faith interpretation by Chrysler of the CBA, simply because any argument by Smolarek with Chrysler over CBA interpretation merely emphasizes to the trier of fact Chrysler's position that the CBA, and not discrimination, was at the root of its motivation.

Therefore, Smolarek's focus will be to demonstrate pretext, by showing that the CBA was not involved in the decision. Obviously, under such circumstances, Smolarek's claim is not dependent on the

terms of the CBA. To the contrary, Smolarek's handicap claim meets the parallelism principle established in Lingle, so central to the outcome of this case that it bears repeating here:

> "In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes."

In short, this case no more requires analysis of the terms of the CBA than a discrimination case against an employer-at-will would require an analysis of whether the employer was truly an at-will employer.

B. The Sixth Circuit Correctly Applied The Test For Pre-Emption Established By This Court.

The Court below recognized the distinction that is crucial to proper resolution of this case when it held in the companion Fleming case:

> "We recognize that Chrysler is likely to assert as its defense

> to Fleming's claim that it based its actions on the provisions of the labor agreement regarding reinstatement and accommodation. Even this defense, however, does not require a finding of preemption. In order to resolve the HCRA claim in light of this defense, a court need only decide whether Chrysler took actions adverse to Smolarek [sic] because of his handicap or solely because Chrysler felt bound by the union agreement to take the actions. It is not necessary to decide whether or not Chrysler's interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: What was Chrysler's motivation?"

2. THERE IS NO CONFLICT IN THE CIRCUITS ON THIS ISSUE

A. The Ninth Circuit Has Decided Two State Handicap Discrimination Claim Cases Consistently With The Sixth Circuit In The Case At Bar.

In Miller v AT&T Network Systems, 850 F.2d 543 (9th Cir. 1988), the Ninth Circuit Court of Appeals, in a very well-reasoned opinion, recently outlined a three-pronged test pursuant to the rule

enunciated by this Court in Allis Chalmers Corp. v Lueck, 471 U.S. 202 (1985) to determine whether a state law claim is sufficiently "independent" of a CBA to withstand §301 pre-emption:

> "In deciding whether a state law is preempted under §301, thereore, a court must consider: (1) whether the CBA contains provisions that govern the actions giving rise to a state claim and if so, (2) whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the CBA, and (3) whether the state has shown an intent not to allow its prohibition to be altered or removed by private contract. A state law will be preempted only if the answer to the first question is 'yes,' and the answer to either the second or third is 'no.' [footnote omitted]

The Court in Miller had before it the Oregon Handicap Discrimination Law, Oregon Revised Statutes §659.121, 659.405, and 659.425. The plaintiff in the case was unable to work in high temperatures because of an effect on his heart. Though normally assigned to cool climates, he received a 13 week

assignment in Arizona in the summer, and lost consciousness on the job there one day. He refused to return to work in Arizona and was fired, though willing to return to the cooler climate. The CBA governed assignments, transfers, and discharges, so the first prong for preemption under the above test was met.

However, the State of Oregon made it unlawful to fire an employee because of a physical handicap if, with reasonable accommodation, the individual could perform the work. Taking this into account, and examining the Oregon Supreme Court's construction of its handicap discrimination law, the Ninth Circuit noted that the State of Oregon construes its discrimination statute "so that it relies on standards of discriminatory firings that are independent of any standards of reasonable treatment set forth in the CBA":

> "This state tort does not require a comparison of the discharge provisions of the CBA with the requirements of the statute. It requires only a showing that there is no probability that Miller cannot do the job satisfactorily or that he can do so only at the risk of incapacitating himself. We therefore conclude that

> Oregon's antidiscrimination statute articulates an independent standard that is not inextricably intertwined with the interpretation of terms in the CBA.

Further, the Ninth Circuit concluded that the right to be free of handicap discrimination in Oregon was non-negotiable because of the legislature's expressed policy that:

> "employment without discrimination because of handicap ... [is] declared to be the right of all people in this state."

Similarly, Michigan's HCRA articulates a standard of discrimination that is independent of standards of reasonable treatment found in a CBA. Pertinent portions of the Michigan statute make it clear that any employer having four or more employees, and whose employee is not the parent, spouse, or child of the employer, shall not discharge or otherwise discriminate against an employee with respect to the terms, conditions, or privileges of employment because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position. MCL §37.1201 (b) and 1202; MSA

3.550(201)(b) and (202).

In Carr v General Motors Corp., 425 Mich 313; 389 N.W. 2d 686, (1986), the Michigan Supreme Court interpreted the handicap statute as follows:

> "The Legislature has spoken clearly and has mandated, not just once, but many times throughout the HCRA, that the only handicaps covered by the act, for purposes of employment, are those unrelated to ability to perform the duties of the position."

Obviously, the standard by which to measure handicap discrimination in Michigan, as established by statute and interpreted by the Michigan Supreme Court, is remarkably similar to the statutory standard of the Oregon law that was considered in Miller and was held not preempted. Hence, the State of Michigan has articulated a standard sufficiently clear that plaintiff's handicap discrimination claim can be evaluated without considering any overlapping provisions of the CBA.

Considering the third prong of the test in Miller, Michigan has clearly intended that the right to be free of handicap discrimination shall be non-negotiable. For example, the preamble to

the Handicappers' Civil Rights Act states:

> "An act to define the civil rights of individuals who have handicaps; to prohibit discriminatory practices, policies, and customs in the exercise of those rights; and to provide for the promulgation of rules."

No exemption from the statute is granted to unionized employers:

> "Employer" means a person who has 4 or more employees or a person who as contractor or subcontractor is furnishing material or performing work for the state or a governmental entity of agency of the state and includes an agent of such a person."

Further, the Michigan Supreme Court, in Carr, supra, cited the comments of a state senator made at the time of passage of the Act, and while speaking on the Senate floor, regarding the intent of the Act:

> "The bill essentially spells out the above areas of civil rights, now guaranteed to all, and applies them with equal force under the law to this new category. Handicapped persons wish to, and, when the legislation is enacted into law, must be judged and accepted based on their

ability." [emphasis added]

Hence, Michigan, like Oregon in the Miller case, has clearly shown an intent not to allow its prohibition against handicap discrimination to be altered or removed by private contract.

Thus, under the test enunciated by the Ninth Circuit in Miller, the Michigan Handicappers' Civil Rights Act clearly should not be preempted.

In Ackerman v Western Electric Co, 860 F.2d. 1514 (9th Cir. 1988), the 9th Circuit ruled that an employee's California state law handicap discrimination claim was not preempted by § 301. Reasoning that Lingle, supra, was controlling, and following its decision in Miller, supra, the Court stated that the employee's state law right is defined and enforced without reference to the terms of a collective bargaining agreement. Hence, the Ninth Circuit again applied the test set forth by this Court and decided the case consistently

with the Sixth Circuit in the case at bar.

B. The Circuit Court Decisions Alleged By Petitioner To Be In Conflict With The Sixth Circuit In The Case At Bar Are In Fact Distinguishable.

Douglas v American Information Technologies Corp, 877 F.2d. 565 (7th Cir. 1989), alleged by petitioner to be in conflict with the Sixth Circuit here, is readily distinguishable. There, the plaintiff filed a complaint for intentional infliction of emotional distress stemming from management's alleged retaliation for her refusal to perform stressful or overtime work on account of her medical condition. The retaliation alleged included, inter alia, arbitrary denial of excused work days, the giving of an unjustified final warning, the subjecting of the plaintiff to the "ordeal" of filing grievances, the threat of firing if the plaintiff took any time off, and the subjecting of the plaintiff to excess scrutiny of her work.

The Seventh Circuit examined first the elements of a state cause of action for intentional infliction of emotional distress: 1) extreme and outrageous

conduct; 2) intent or knowledge that the conduct will inflict severe emotional distress. Given the nature of the retaliation alleged, the Seventh Circuit concluded that interpretation of the terms of the CBA would be necessary in order to determine whether the conduct was authorized by the CBA:

> "Because Ms. Douglas' intentional infliction of emotional distress claim, consists of allegedly wrongful acts directly related to the terms and conditions of her employment, resolution of her claim will be substantially dependent on an analysis of the terms of the collective bargaining agreement under which she is employed. A court will be required to determine whether her employer's conduct was authorized by the explicit or implicit terms of the agreement. Therefore, we hold that Ms. Douglas' state-law claim is preempted and must be pursued as a section 301 claim." [footnote omitted] Douglas, supra, at 573.

The Seventh Circuit decided the case as it did because a crucial measure of whether the employer's conduct was outrageous turned on whether or not the conduct was authorized by the CBA. If it was, then the employer would have done no

more than insist on its legal rights in a permissible way, Douglas, supra, at 571, which is a valid defense to a claim for intentional infliction of emotional distress.

Here, and this is the crux, in contrast, it is not necessary to decide whether the CBA provisions Chrysler points to truly apply to Smolarek's situation. It is only necessary to decide whether Chrysler had the CBA in mind when it denied Smolarek a chance to return to work.

Significantly, the Seventh Circuit itself, in Douglas, supra, applied Lingle, supra, and distinguished Miller, supra. Hence, it saw no conflict with the Ninth Circuit in its application of Lingle.

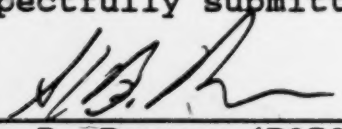
Similarly, Johnson v Anheiser Busch, Inc, 876 F.2d. 620 (8th Cir. 1989), also claimed by Chrysler to be in conflict with the Sixth Circuit here, is easily distinguished. There, state law claims for slander, intentional infliction of emotional distress, tortious interference with contract, and wrongful discharge were held preempted. The case arose following the plaintiff's dis-

charge after he was accused of slashing tires in a company parking lot. As in Douglas, supra, these claims were pre-empted because their resolution would depend on interpretation of the CBA: the fact finder simply could not decide the case without determining the extent to which the conduct of the employer was authorized by the terms of the CBA. Again, that is a far cry from this case, where it is only necessary to decide whether or not Chrysler had the CBA in mind as its motivation for refusing to return Smolarek to work.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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November 1989

APPENDICES

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

STANLEY SMOLAREK,

Plaintiff,

86-606822 CZ 04-01-86 SIMMO
SMOLAREK V CHRYSLER CORP

-vs-

CHRYSLER CORPORATION,

Defendant.
_____/

JURY DEMAND

JURY FEE PAID
THIS DATE:
APR 01 1986

COMPLAINT AND JURY DEMAND

Plaintiff complains that:

Count I. - Handicap Discrimination

1. Plaintiff at all times pertinent has been a resident and citizen of the State of Michigan.

2. Defendant at all times has been a corporation having its principal place of business in Wayne County and is therefore a citizen of the State of Michigan.

3. The amount in controversy, exclusive of interest, costs, and attorney fees, is in excess of Ten Thousand Dollars ($10,000.00).

4. Defendant at all times pertinent has been an employer within the meaning of Michigan's Handicappers' Civil Rights Act.

5. Plaintiff has been an employee of defendant since 1953.

6. In 1955, plaintiff suffered an injury while in the course of his employment at Chrysler.

7. Complications following that injury necessitated brain surgery.

8. Since that injury in 1955, plaintiff has had a medical condition that leaves him subject to occasional seizures which are largely controlled with medication.

9. Plaintiff was actively employed at Defendant's

Jefferson Assembly Plant for more than ten years up to approximately October 8, 1984.

10. At all times, plaintiff performed his job duties competently and satisfactorily.

11. At all times, plaintiff's medical condition has been unrelated or substantially unrelated to his ability to perform the duties of his job.

12. On or about October 8, 1984, plaintiff suffered a seizure while at work.

13. Plaintiff was disabled following that incident for aproximately two weeks.

14. Thereafter, plaintiff reported to work to his former position.

15. At all times pertinent, it has been the duty of defendant to its employees in general and to plaintiff in particular under Michigan's Handicappers' Civil Rights Act to:

> a) refrain from discriminating against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position;
>
> b) refrain from limiting, segregating, or classifying an employee in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely effect the status of an employee because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position;
>
> c) refrain from taking discriminatory action against an individual on the basis of physical examinations that are not directly related to the requirements of the specific jobs;
>
> d) accommodate plaintiff's handicap by providing him with work which would fit his particular needs or handicap and otherwise accommodate plaintiff so that he can remain in the active employ of defendant.

16. Notwithstanding those duties and in direct violation thereof, defendant has refused to return plaintiff to his former position or another position consistent with his medical

restrictions and has maintained plaintiff instead on a disability lay off indefinitely.

17. As a direct and proximate result of the above violation by defendant, plaintiff has lost and will continue to lose wages, seniority, and other fringe benefits of employment and has and will continue to suffer nondisabling mental and emotional anguish and distress, embarrassment, humiliation, loss of self-esteem, and sense of outrage and indignity.

WHEREFORE, Plaintiff demands the following relief:

a) reinstatement to his former position upon conditions free from discrimination;

b) compensatory and exemplary damages for whatever amount in excess of Ten Thousand Dollars ($10,000.00) plaintiff is found to be entitled;

c) interest, costs, and attorney fees;

d) such other relief that this Court deemsjust and equitable in the circumstances.

Count II.
Workers' Disability Compensation Retaliation

1. Plaintiff incorporates Count I.

2. At the time that plaintiff reported for work following the October 1984 seizure, defendant refused to return plaintiff to work because defendant feared unduly that plaintiff might injure or re-injure himself at work arising out of and in the course of his employment, thereby rendering defendant liable for workers' disability compensation benefits.

3. At all times, it has been the duty of defendant to refrain from discriminating or otherwise retaliating against its employees in general and plaintiff in particular in anticipation of such employee making a claim against defendant under the Workers' Disability Compenstion Act.

4. Notwithstanding that duty and in direct violation thereof, defendant has refused to return plaintiff to work.

5. As a direct and proximate result of this action by defendant, plaintiff has suffered all of the injuries and damages as alleged in Count I.

WHEREFORE, Plaintiff demands judgment against defendant as requested in Count I.

KELMAN, LORIA, DOWNING
SCHNEIDER & SIMPSON

By _____

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DATED: April 1, 1986

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

STANLEY SMOLAREK,

Plaintiff,

86-603822 CZ 04-01-86 SIMMO
SMOLAREK V CHRYSLER CORP

-vs-

JURY DEMAND

CHRYSLER CORPORATION,

Defendant.
_____/

DEMAND FOR TRIAL BY JURY

NOW COMES Plaintiff, STANLEY SMOLAREK, by and through his attorneys, KELMAN, LORIA, DOWNING, SCHNEIDER & SIMPSON, and hereby makes a formal demand for a trial by jury on all of the issues in the above cause of action.

KELMAN, LORIA, DOWNING
SCHNEIDER & SIMPSON

By _____
ALAN B. POSNER (P 27981)
Attorneys for Plaintiff
2300 First National Building
Detroit, MI 48226
(313) 961-7363

DATED: April 1, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STANLEY SMOLAREK,

Plaintiff,

-v- No. 86 CV71763 DT

CHRYSLER CORPORATION, HON. JULIAN ABELE COOK, JR.

Defendant.

AFFIDAVIT OF STANLEY SMOLAREK
IN SUPPORT OF MOTION TO REMAND

STATE OF MICHIGAN)
:SS
COUNTY OF WAYNE)

STANLEY SMOLAREK, Plaintiff in this action, deposes and says that:

1. I first became employed with Chrysler Corporation in 1953.

2. I remained an employee of Chrysler until my lay-off on or about October 8, 1984.

3. In 1955, while in the course of my employment at Chrysler, I suffered an accident which has left me with a post-traumatic seizure disorder.

4. This seizure disorder is controllable with medication which I have taken since 1955.

5. On October 8, 1984, I suffered a seizure at work.

6. Within about two weeks after suffering that seizure, the

medical department at Chrysler examined me and renewed the medical restrictions that I had had since my 1955 injury.

7. My medical condition and the medical restrictions that I had were unrelated to my ability to perform the maintenance-type work that I performed in 1984.

8. After my examination at the medical department, I reported to my general foreman for the purpose of returning to work.

9. At that time, I was told that there was no work available within my medical restrictions, even though I had reason to believe that my former job was still available.

10. In 1985, I reported back to the plant and had a further discussion with my general foreman in an effort to return to work.

11. At that time, the general foreman explained his reason for not returning me to work as follows: "Stan, what if you fall down and other people in the plant see you and you are having a seizure. The other people could have a heart attack."

12. It is my information and belief that the general foreman had the authority to return me to work to my former position if he was so inclined.

13. It is my information and belief that my former job has remained available since October 8, 1984.

14. It is my belief that the general foreman did not return me to work at my former job because of unfounded perceptions on

his part concerning the ability to work of persons with seizure disorders.

Stanley A Smolarek
STANLEY SMOLAREK

Subscribed and sworn to before me
this 3rd day of September, 1986.

Kimberly K Coalson
NOTARY PUBLIC
Wayne County, MI
My Commission Expires: 2/12/90

KIMBERLY K. COALSON
Notary Public, Wayne County, Michigan
My Commission Expires February 12, 1990

(3)

No. 89-568

In The

Supreme Court of the United States

October Term, 1989

CHRYSLER CORPORATION, ET AL.,
Petitioners,

v.

STANLEY SMOLAREK AND RALPH FLEMING,
Respondents.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LOPATIN, MILLER, FREEDMAN,
BLUESTONE, ERLICH, ROSEN AND BARTNICK
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12 pp

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit erred in reversing the district court's decision that § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts a state-law handicap discrimination claim, where the district court failed to determine whether the claim could properly arise under the Michigan Handicappers' Civil Rights Act, M.C.L. §§ 37.1101 *et. seq.*, independent of the collective bargaining agreement.

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No. 89-568

In The

Supreme Court of the United States

October Term, 1989

CHRYSLER CORPORATION, ET AL.,

Petitioners,

v.

STANLEY SMOLAREK AND RALPH FLEMING,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REASONS FOR DENYING THE PETITION FOR CERTIORARI

Upon distillation, the actual issue raised by this petition is of no fundamental significance to federal preemption law. The underlying facts demonstrate that a *quirk of timing* generated such confusion, that it is difficult to disentangle the significant from the inconsequential. Respondent will carefully review the facts of this case, thereby demonstrating that this case is *sui generis*.[1] Review by the United States Supreme Court is entirely unwarranted.

Respondent (plaintiff), Ralph Fleming, filed his lawsuit in a Michigan state court on July 29, 1985. Memo-

[1] All references to Appendices refer to appendices contained in Petition for Writ of Certiorari.

randum Opinion and Order Granting Defendant's Motion for Summary Judgment, App. E, 49a. Fleming alleged that petitioner, Chrysler Corporation (hereafter Chrysler), failed to make provisions for his physical condition, which constituted handicap discrimination, pursuant to Michigan's Handicappers' Civil Rights Act, M.C.L. §§ 37.1101 *et seq.* (HCRA). *Id.* Throughout this case, Fleming's claim has been characterized as a failure-to-accommodate claim. When Fleming filed his complaint, Michigan law required "significant accommodation."[2] *Carr* v. *General Motors Corp.*, 135 Mich.App. 226; 353 N.W.2d 489, rev'd 425 Mich. 313; 389 N.W.2d 686 (1986); *Wardlow* v. *Great Lakes Express Co.*, 128 Mich.App. 54; 339 N.W.2d 670 (1983).

Thus, *on the date that Fleming filed his complaint*, he stated a cause of action which was not preempted by federal law. This proposition is explicitly acknowledged by the minority opinion below, in its discussion of other cases. Referring to *Ackerman* v. *Western Electric Co.*, 860 F.2d 1514 (CA 9, 1988) and *Miller* v. *AT&T Network Systems*, 850 F.2d 543 (CA 9, 1988), Judge Kennedy (concurring in part and dissenting in part), App. A, 25a, wrote:

> Those cases found that Ackerman's (California) and Miller's (Oregon) handicap discrimination claims were not preempted by § 301 because they did not "require interpretation of a collective bargaining agreement." Ackerman, 860 F.2d at 1517. The key difference between these cases

---

[2] By the term "significant accommodation," respondent means the type of accommodation required by the Michigan Court of Appeals in *Carr* v. *General Motors Corp.*, 135 Mich.App. 226; 353 N.W.2d 489, rev'd 425 Mich. 313; 389 N.W.2d 686 (1986), and *Wardlow* v. *Great Lakes Express Co.*, 128 Mich.App. 54; 339 N.W.2d 670 (1983). This "significant accommodation" might include, for example, transfer to another duty.

> and the Michigan HCRA, however, is that the Oregon and California statutes *require* accommodation. Thus, accommodation is a *non-negotiable* right under Oregon and California law. Under the doctrine of parallelism, the state-law claim is not preempted because it is unnecessary to interpret the collective bargaining agreement — the right is provided by statute regardless of what the agreement may or may not provide. [Emphasis in original.]

Further, Chrysler also implicitly acknowledges that on the date Fleming filed his complaint, his cause of action was not preempted by federal law. Petition for a Writ of Certiorari, note 10, p. 27.[3]

Chrysler removed this case to federal district court on August 22, 1985. Verified Petition for Removal, NR 1. Again, utilizing the dissenting opinion's reasoning, under Michigan law in effect on the date of removal, Fleming's HCRA claim was not preempted by federal law.

On October 10, 1985, the district court denied Fleming's motion to remand. Order Denying Motion to Remand, NR 11. Again, on that date, Fleming's HCRA claim was not preempted by federal law.[4]

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[3] If not, petitioner would have this Court overrule *Ackerman* and *Miller*; in that event, petitioner is without support from the minority opinion below.

[4] The order denying remand was proper, because "Judge LaPlata ruled at that time that plaintiff's claims of breach of an implied duty of good faith and interference with pursuit of his occupation arise under § 301." Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment, App. E, 49a. Fleming did not appeal either Judge LaPlata's order denying remand nor any finding that those counts are preempted. Only the HCRA claim is at issue here.

On July 8, 1986, the Michigan Supreme Court reversed the Court of Appeals when it released *Carr* v. *General Motors Corp.*, 425 Mich. 313; 389 N.W.2d 686 (1986). There, the court held that the HCRA did not require significant accommodation.[5] At this juncture, Chrysler moved for summary judgment, contending that (1) federal law preempted Fleming's cause of action, and (2) *Carr* precluded Fleming's cause of action. Defendant Chrysler Motors Corporation's Notice and Motion for Summary Judgment, NR 36. Fleming responded to Chrysler's citation to *Carr* by noting that the *Carr* decision had not yet "issued," pursuant to Michigan's court rule, M.C.R. 7.317(C), and that a motion for rehearing had been timely filed (joined by numerous public foundations). Plaintiff's Answer to Defendant's Motion for Summary Judgment, NR 41. Accordingly, Fleming argued that *Carr* had no precedential force, until and unless the Michigan Supreme Court rejected the motion for rehearing.

Due to a quirk of timing, therefore, the district court did not construe the HCRA, under the *Carr* decision. The importance of the district court's failure to delineate the exact parameters of the HCRA and its applicability to Fleming's claim cannot be overemphasized.

With the benefit of hindsight, the district court clearly erred in failing to recognize that Michigan's HCRA must be construed and applied to the facts of this case *before* it determined whether the claim is preempted. *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. —, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988); *Ackerman* v. *Western Electric Co.*, 860 F.2d 1514 (CA 9, 1988); *Miller* v. *AT&T Network Systems*, 850 F.2d 543 (CA 9, 1988). As noted by the dissenting opinion's dis-

---

[5] See footnote 2.

cussion of *Ackerman* and *Miller*, "Under the doctrine of parallelism, the state-law claim is not preempted because it is unnecessary to interpret the collective bargaining agreement — the right is provided by statute regardless of what the agreement may or may not provide." App. A, 25a.

Therefore, this appeal is presented in an absurd posture. The district court neglected to determine if, under current Michigan law, Fleming has a cause of action independent of the CBA. Without that determination, it was logically impossible for the district court to appropriately examine the issue of federal preemption. Accordingly, respondent respectfully submits that the procedural confusion inherent in this case minimizes its importance and leads to a denial of further review.

Petitioner insists (and the dissenting opinion agrees) that Fleming's complaint should be examined to determine if his claim is preempted. Petitioner implicitly admits, as does the dissenting opinion, that Fleming's complaint would not be preempted under Michigan law, at the time the complaint was filed. Nevertheless, petitioner insists that respondent's claim should be preempted. Petitioner's argument is:

(1) Present Michigan law undermines the 1985 complaint.

(2) Since present Michigan law undermines the 1985 complaint, plaintiff's right to accommodation must be predicated upon the collective bargaining agreement (CBA).

(3) A claim that a right is created by the CBA is preempted by federal law.

Petitioner's argument leapfrogs the critical analytical step; it is the district court's province to determine initially whether Michigan law either partially or completely undermines the 1985 complaint. Since Fleming

cannot predicate his handicapper's failure-to-accommodate claim on the CBA pursuant to *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985), it is incumbent upon Fleming to demonstrate to the district court that his claim survives the *Carr* decision without recourse to the CBA, or to demonstrate that he should be permitted to amend his complaint in order to survive the *Carr* decision. The quirk of timing, whereby the trial court failed to give direct consideration to *Carr*, created this void. Without a preliminary determination of the exact scope of Michigan's HCRA, the issue of preemption cannot be resolved. Thus, the decision below appropriately remanded this action to the district court for further proceedings.

The dissenting opinion failed to recognize this gap in the district court's reasoning. Instead, the dissenting opinion observed that "the question of whether removal jurisdiction exists based upon a federal question is answered by reviewing the complaint as of the time of removal. * * * [T]he Court must look to the face of the complaint *at the time of removal.*" App. A, 20a. This proposition, although well established under ordinary circumstances, does not escape the impasse. The dissent failed to acknowledge that the "face of the complaint rule" merely raises a new question: Should the appellate court consider the Michigan law in effect at the time of removal (which clearly demonstrates that there is no preemption) or should it consider current Michigan law? The "face of the complaint" rule is simply inadequate under the circumstances of this case. It cannot remedy the essential defect in the posture of this case — that the district court never determined whether Fleming had stated, or by amending his pleadings could state, a cause of action under Michigan's HCRA, independent of the CBA.

The district court acknowledged that Fleming's complaint did not refer to the CBA between Chrysler and the United Auto Workers union. *Id.* However, the district court observed that the complaint is "replete with references to issues covered by the CBA." *Id.* Accordingly, the district court granted Chrysler's motion to dismiss Fleming's claim of handicap discrimination. *Id.* at 51a. With the benefit of hindsight, we now know that the district court used the wrong criterion. The test is not whether the complaint is "replete with references to issues covered by the CBA." The test is whether "under the doctrine of parallelism, the state-law claim is not preempted because it is unnecessary to interpret the collective bargaining agreement — [and whether] the right is provided by statute regardless of what the agreement may or may not provide." Opinion below (J. Kennedy concurring in part and dissenting in part), App. A, 25a. Respondent respectfully submits that the procedural confusion inherent in this case makes this cause of action inappropriate for review by the United States Supreme Court.

The majority and the minority opinions below are fundamentally harmonious. They concurred that if Fleming states a cause of action under the HCRA, independent of the CBA, the action is not preempted, but if the claimed right derives from the CBA, there is preemption. The sole distinction is that the majority opinion recognized that the district court failed to rule on whether Fleming's action does, or upon amendment could, arise from the HCRA, independent of the CBA. Judge Wellford observed that, upon remand, Chrysler may choose to rely upon the *Carr* decision. App. A, 15a. Thus, under the majority ruling, the district court will, at last, determine if respondent states a cause of action under Michigan's HCRA. Respondent respectfully submits that the minimal issue, if any,

presented by this petition does not warrant review by the United States Supreme Court.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

LOPATIN, MILLER, FREEDMAN,
BLUESTONE, ERLICH, ROSEN AND BARTNICK

By: /s/ RICHARD E. SHAW
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Attorneys for Respondent

DATED: November 9, 1989

No. 89-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHRYSLER CORPORATION, ET AL.,

Petitioners,

v.

STANLEY SMOLAREK and RALPH FLEMING,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., IN SUPPORT OF THE PETITION

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No. 89-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHRYSLER CORPORATION, ET AL.,

Petitioners,

v.

STANLEY SMOLAREK and RALPH FLEMING,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF AMICUS CURIAE OF THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., IN SUPPORT OF THE PETITION

The Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari filed by Chrysler Corporation.[1]

[1] The written consents of the parties to the filing of this brief have been filed with the Clerk.

INTEREST OF THE AMICUS CURIAE

MVMA is a trade organization whose member companies build 98% of all motor vehicles produced in the United States and numerous other products. MVMA members include Chrysler Corporation; Ford Motor Company; General Motors Corporation; Honda of America Manufacturing, Inc.; Navistar International Transportation Corp.; PACCAR, Inc.; and Volvo North American Corporation. The MVMA member companies employ over 1.2 million workers; a substantial proportion of those employees are represented by unions and covered by collective bargaining agreements. The collective bargaining agreements covering most of these employees are the product of industry-wide "pattern bargaining." As a result, the employment of most of the employees of MVMA members is governed by agreements containing handicap discrimination clauses and grievance procedures that are virtually identical to those involved in this case.

This case presents an issue of great importance to MVMA members and to other employers throughout the country whose employees are covered by collective bargaining agreements. The court of appeals held that the handicap discrimination claims of two Chrysler employees were not pre-empted by Section 301 of the Labor Management Relations Act even though those claims were based on rights conferred under a collective bargaining agreement and ultimately would require interpretation of that agreement. The decision conflicts with the important federal policies favoring resolution of labor disputes by arbitration and application of a uniform body of federal law to claims based on collective bargaining agreements. As such, the court of appeals' decision threatens to disrupt the labor relations of MVMA members and other em-

ployers and to deprive employers and unions of the full benefit of their agreements to resolve all contractual disputes through contractual procedures culminating in final and binding arbitration.

STATEMENT

As the court of appeals held (Pet. App. 2a), "[t]hese combined cases present close and difficult questions regarding whether §301 of the Labor Management Relations Act pre-empts plaintiffs' actions claiming violations of Michigan's Handicappers' Civil Rights Act ('HCRA') * * *." Two Chrysler employees, Stanley Smolarek and Ralph Fleming, sued Chrysler claiming that the company's failure to place them in positions consistent with their medical restrictions violated HCRA. It is beyond dispute that HCRA does *not* require accommodation of job-related handicaps (i.e., handicaps related to the employee's ability to perform his job). *Carr* v. *General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686 (1986). It is also beyond dispute that the collective bargaining agreement between Chrysler and the United Automobile Workers ("UAW") does require some accommodation of job-related handicaps. Pet. 3. Yet Smolarek and Fleming contend that Chrysler's alleged failure to accommodate their job-related handicaps (as required only by the collective bargaining agreement) violated HCRA (which itself does not require such accommodation). Reversing the district court decision in each case by an 8 to 7 vote, the court of appeals held that the HCRA claims were not pre-empted by §301. That conclusion is directly contrary to this Court's unanimous decision in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), and conflicts with the decisions of other circuits and with the important federal policies favoring resolution of labor dis-

putes through arbitration and requiring application of a uniform body of federal law to such claims.

1. Stanley Smolarek, a Chrysler employee since 1953 and a UAW member, has suffered from a seizure disorder for over thirty years. Over those years, certain medical restrictions were placed on his on-the-job activities. Chrysler continued to employ him despite those restrictions. In October 1984, Smolarek suffered a seizure while at work. He was absent from work for two weeks and, upon his return, was told that there were no jobs available consistent with his medical restrictions. Pet. App. 2a-3a.

Rather than file a grievance claiming violation of the provisions of the collective bargaining agreement requiring "reasonable accommodation [of] an employee's handicap" (Pet. 3), Smolarek filed suit in state court claiming that Chrysler violated HCRA by failing to reinstate him to "his former position or another position consistent with his medical restrictions." Pet. App. 20a. Smolarek's prayer for relief asked the court to require Chrysler to "accommodate plaintiff's handicap by providing him with work which would fit his particular needs or handicap and otherwise accommodate plaintiff so that he can remain in the active employ of defendant." Pet. App. 45a.

Chrysler removed the suit to federal court on the ground that Smolarek's complaint presented a federal question under §301. Denying Smolarek's motion to remand, the district court held that Smolarek's HCRA claims were pre-empted by §301 and dismissed the suit for failure to exhaust the contractual remedies. Pet. App. 3a.

2. Ralph Fleming began working at Chrysler in 1976. Like Smolarek, he was a member of the UAW and was represented by that union for collective bargaining purposes. In 1983, Fleming suffered "severe and permanent

injuries" in an automobile accident. He returned to work at Chrysler after a year of disability leave, but he re-injured himself as he was leaving work in August 1984. He suffered from "loss of balance, severe headaches, muscle spasms in his back, and nausea." Pet. App. 3a. He returned to work again after an additional period of leave, but his "physical condition * * * precluded him from performing his assigned duties." Pet. App. 48a. He requested that his union attempt to secure an accommodation of his handicap but before that was accomplished he was placed on indefinite layoff as part of a reduction in force at the Chrysler plant where he worked. Pet. App. 49a.

Fleming claimed that he was not really laid off, but was actually improperly discharged. The UAW filed a grievance on his behalf which was pending when Fleming voluntarily quit his employment as part of a settlement of his workers' compensation claim against Chrysler. Pet. App. 49a. Fleming then brought this suit in state court, claiming that Chrysler violated HCRA by "[f]ailing to suggest and/or implement reasonable accommodations so as to allow [him] to work despite his physical determinable handicap * * *." Pet. App. 22a. Chrysler removed the case to federal court and the court granted Chrysler's motion for summary judgment, holding that Fleming's HCRA claims were pre-empted by Section 301 and that Fleming had failed to exhaust his contractual remedies.[2]

3. The two cases were consolidated on appeal. The court of appeals, sitting *en banc*, reversed the district

[2] In addition to the HCRA claim, Fleming's complaint alleged three other state law causes of action. The district court denied Fleming's motion to remand on the ground that two of those *other* claims stated federal questions. Fleming did not appeal the dismissal of those two claims, so the propriety of the removal of Fleming's action was not at issue in the court of appeals and is not before this Court.

court's pre-emption holdings, with seven of the fifteen judges dissenting.[3] The court characterized this Court's decision in *Lingle* v. *Norge Division of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988), as approving "the Seventh Circuit's recognition that '§301 does not pre-empt state anti-discrimination laws, * * *.' " Pet. App. 11a. Starting from that broad reading of *Lingle*, the court of appeals separately examined Smolarek's and Fleming's claims to determine whether they presented any special circumstances justifying a departure from the "rule". The court acknowledged at the outset that under settled Michigan law, "a plaintiff who concededly cannot perform the duties of a particular job and who claims that his employer must accommodate him does not state a claim under HCRA." Pet. App. 11a.

Smolarek based his claim in substantial part on Chrysler's failure to "accommodate [his] handicap" and to reinstate him "to his former position or another position consistent with his medical conditions." Although it was undisputed that he could only work subject to medical restrictions, the court of appeals held that because an employee could make out a prima facie case under HCRA without relying on rights under the collective bargaining agreement (if he could show that he was capable of working at his former job), Smolarek's claim was not pre-empted (Pet. App. 14a):

> Smolarek's complaint makes reference to his reporting to work "to his former position," and that "defendant has refused to return plaintiff to his former position" in violation of HCRA. * * * Only if found not capable of working at this former job would the court be concerned with Smolarek's alternative contention that he be placed in "another position consistent with his medical restrictions." That Chrysler may defend this latter alternative claim by reference to its re-

[3] An earlier panel opinion was vacated by the court's order granting the motion for rehearing *en banc*. Pet. App. 28a.

> sponsibilities under the collective bargaining agreement in respect to reasonable accommodation of Smolarek's "medical restrictions" is, in our view, no basis to hold that §301 preemption is mandated under these circumstances.

Smolarek's complaint on its face alleged that Chrysler was required to accommodate his job-related handicap, and it is clear that accommodation of such handicaps is not required by the HCRA but may be required by the union contract. But the court held that the issue of accommodation under the collective bargaining agreement would arise only as a defense to Smolarek's claim. Relying on *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987), the court held that even if it is governed by §301, under the "well-pleaded complaint" doctrine a contract claimed raised as a defense does not warrant removal of a state case to federal court.[4]

Turning to Fleming's claims, the court of appeals acknowledged that Fleming was seeking an accommodation of his job-related handicap (i.e., "work consistent with his medical restrictions"; Pet. App. 15a), but held that Fleming could make out a prima facie case under HCRA if he showed that Chrysler's actions were discriminatorily motivated. Even though HCRA does not require such accommodation, the court held that Fleming could establish liability under the statute if he could show that "Chrysler took adverse actions against him and * * * that the actions were motivated by his handicap." *Ibid.* "It is not necessary to decide at the outset whether or not Chrysler's

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[4] Because it held that it was raised as a defense, the court did not address the merits of Chrysler's argument that Smolarek's accommodation claim was pre-empted by §301. But it indicated that if it did reach that issue it would apply the same analysis it used in holding that Fleming's claim was not pre-empted. Pet. App. 14a-15a & n.3.

interpretation of the agreement is correct as a matter of federal labor law. The question is a factual one: what was Chrysler's motivation?" Pet. App. 16a. In the court of appeals' view, that question did not require contract interpretation and was "sufficiently 'independent' of the collective bargaining agreement to escape §301 pre-emption." *Ibid.*

4. Seven of the fifteen circuit judges dissented and joined an opinion by Judge Kennedy. The dissenting judges criticized the majority for failing to look beyond the pleadings to the reality of the respondents' claims. Pet. App. 19a. They would have held that Smolarek's claim was pre-empted insofar as it sought accommodation of his job-related handicap (Pet. App. 20a-21a):

> At the time of removal, Smolarek claimed a right to reinstatement to "his former position or another position consistent with his medical restrictions. * * *" To the extent that Smolarek asks for reinstatement to another position, his claim is clearly preempted. There is no right independent of the collective bargaining agreement to be reinstated to another job consistent with one's medical disability under HCRA.

Similarly, to the extent that Fleming "claim[ed] a right to reinstatement to another position," the dissenting judges believed his claim was also pre-empted. Pet. App. 22a. "The only source of Chrysler's duty to [accommodate Fleming] is the collective bargaining agreement." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case, much like the Wisconsin Supreme Court's decision in *Allis-Chalmers Corp.* v. *Lueck,* would allow state court judges, applying state law, to resolve disputes over collective bargaining agreement provisions that should be resolved by arbitrators applying uniform federal law and the "law of the shop." As the sharp division among the circuit judges in this case demonstrates, the courts have had considerable difficulty applying *Lingle* and have reached conflicting results. See also, *Machinists Local 437* v. *United States Can Co.*, 150 Wisc. 2d 479, 441 N.W.2d 710 (Wisc. 1989) (a 4-3 decision of the Wisconsin Supreme Court); *Cuffe* v. *General Motors Corp.*, ____ N.W.2d ____ (Mich. App. Oct. 2, 1989) (holding that an HCRA claim was pre-empted by §301); *Metro* v. *Ford Motor Co.*, ____ N.W.2d ____ (Mich. App. Aug. 25, 1989) (expressly rejecting the Sixth Circuit's holding in this case). In *Cuffe* and *Metro,* the Michigan Court of Appeals held that handicap discrimination claims that were virtually identical to those raised in this case were pre-empted. This Court should grant the petition to clarify the proper scope of *Lingle* and to reaffirm that §301 pre-empts state law actions relating to rights grounded in collective bargaining agreements.

A. The Court Of Appeals' Decision Conflicts With This Court's Repeated Holding That Disputes Dependent On The Terms Of Collective Bargaining Agreements Must Be Resolved Solely Under Federal Law.

1. Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in

> an industry affecting commerce * * * may be brought in any district court of the United States having jurisdiction of the parties.

Although state courts have concurrent jurisdiction over §301 suits, *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), the "dimensions of §301 require * * * that substantive principles of federal labor law must be paramount in the area covered by the statute [so that] issues raised in [§301] suits * * * [are] decided according to the precepts of federal labor policy." *Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

Federal labor policy requires that "doctrines of federal labor law uniformly * * * prevail over inconsistent local rules." *Id.*, at 104. The Court explained the reason for this rule as follows (*id.*, at 103-104):

> [T]he subject matter of §301(a) 'is peculiarly one that calls for uniform law.' * * * The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation * * * [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

The Court therefore held that suits alleging violations of collective bargaining agreements must be examined under

uniform federal law developed under §301 and that state lawsuits dependent on the terms of such agreement are pre-empted.

More recently, in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. at 210, the Court held that '[i]f the policies that animate §301 are to be given their proper range * * * the pre-emptive effect of §301 must extend beyond suits alleging contract violations." In order to serve "[t]he interests in interpretive uniformity and predictability * * *, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from that agreement, must be resolved by reference to uniform federal law * * *." *Id.*, at 211. Federal law must be applied unless the state cause of action is independent of the rights established by the collective bargaining agreement:

> [S]tate-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements. Our analysis must focus, then, on whether the [state cause of action] as applied here confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state] claim is inextricably intertwined with consideration of the terms of the labor contract. If the state * * * law purports to define the meaning of the contract relationship, that law is pre-empted.

Id. at 213 (footnote and citation omitted).

The Court reiterated these concerns yet again in *Electrical Workers* v. *Hechler*, 481 U.S. 851 (1987), and in *Lingle* v. *Norge Division of Magic Chef, Inc.* In *Hechler*, the plaintiff alleged that her union was negligent in fulfilling its duty to ensure a safe workplace. Although her action for negligence was purely a state law cause of action, the Court held that it was pre-empted by §301:

> Respondent's allegations of negligence assume significance if—and only if—the Union, in fact, had assumed the duty of care that the complaint alleges the Union breached. * * * In order to determine the Union's tort liability * * * a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability." 471 U.S., at 218. The need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the pre-emptive force of §301 by casting her claim as a state-law tort action.

In *Lingle*, the Court held that the plaintiff's state law claim that she had been discharged in retaliation for filing a workers' compensation claim was not pre-empted by §301 because that claim was not at all related to or dependent upon the collective bargaining agreement. Although the plaintiff could have challenged her termination under the just cause provision of the union contract, the state law claim and the contract claim operated in parallel, and the state law claim was not at all dependent on any provision of the contract. 108 S. Ct. at 1883. The Court repeated the settled rule "that interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements." *Id.* at 1884.

2. The court of appeals' decision in this case is contrary to those longstanding principles. The court gave dif-

ferent reasons for concluding that the claims of Smolarek and those of Fleming were not pre-empted. As to Smolarek, the court held that his claim "that Chrysler violated its duties under HCRA by refusing to return him 'to his former position or another position consistent with his medical restrictions' " (Pet. App. 11a) was not pre-empted because it included a claim that he be restored to his former position, and not solely a claim that his handicap be accommodated by placing him in "another position consistent with his medical restrictions." In the court's words, "[o]nly if found not capable of working at his former job would the court be concerned with Smolarek's alternative contention that he be placed in 'another position * * *.' " *Id.*, at 14a.

The court's conclusion misses the mark. Smolarek's claim that he should be given "another position" may be pleaded in the alternative, but it is nonetheless an alternative claim that is pre-empted by §301 and the court should have so held. It is beyond dispute that HCRA does not require an employer to accommodate an employee's handicap by placing him in "another position consistent with his medical restrictions." *Carr* v. *General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686 (1986). Any right to such accommodation Smolarek may have had stems not from the HCRA, but from the collective bargaining agreement and therefore must be examined under §301. As the seven dissenting circuit judges pointed out, "[t]here is no right independent of the collective bargaining agreement to be reinstated to another job consistent with one's medical disability under the HCRA." Pet. App. 21. Although the eight circuit judges in the majority acknowledged that there was no right to such accommodation under HCRA (Pet. App. 11a), they nevertheless incorrectly held that the state law claims could go forward.

Moreover, Smolarek was undeniably seeking special accommodation of his medical restrictions even if he were

returned to his former job. Smolarek claimed that Chrysler had previously accommodated his medical restrictions and should do so again. Pet. App. 2a-3a. He asked the court to order Chrysler to "accommodate [his] handicap by providing him with work which would fit his particular needs or handicap and otherwise accommodate [him] so that he can remain in the active employ of [Chrysler]." Pet. App. 45a. Again, such an accommodation of a job-related handicap could be required only by the union contract, not by state law.

In these circumstances, it is clear that Smolarek's claim is not truly independent of the collective bargaining agreement. Chrysler and Smolarek disagree as to the "legal consequences [that] flow from * * * that agreement." Such a disagreement "must be resolved by reference to uniform federal law * * *." *Lueck*, 471 U.S. at 211.

3. As to respondent Fleming, the court of appeals based its holding that the HCRA claim was not pre-empted on what the dissent characterized (Pet. App. 24a) as a "floor of rights" theory which turned solely on motivation:

> Under this theory, [respondents] posit that although an employer need not provide for a right to reinstatement following a disability, if it does provide that right—either through the collective bargaining agreement or voluntarily—it must not discriminate in giving that right to all groups.

Thus the majority opinion (Pet. App. 15a-16a) held that the success of respondent's claim depends on whether Chrysler was "motivated by his handicap" and that "Chrysler must show that its actions were motivated by some factor other than [respondent's] handicap". Under the court's theory, even though HCRA does not require accommodation, Chrysler would violate the statute if it based its decision not to accommodate on the respondents' handicaps, and

that violation would be independent of any contractual right.[5]

This "floor of rights" theory has some superficial appeal. It is commonly accepted that certain actions an employer might ordinarily have every right to take become unlawful if they are taken because of such prohibited considerations as race, or sex, or union activity. But on closer examination, the theory does not hold up in this context. By requiring only that employers not discriminate against handicapped workers when the handicap is "unrelated to the individual's ability to perform the duties of a particular job or position," and thus by not requiring accommodation of job-related handicaps, HCRA permits employers to "discriminate" on the basis of handicap when that handicap *is* related to job ability. In these circumstances, it makes absolutely no sense to say that "Chrysler must show that its actions [i.e., its failure to accommodate] were motivated by some factor other than [the respondents'] handicap[s]." Chrysler had every right under HCRA to base its refusal to accommodate on respondents' handicaps. The only right respondents might have had to accommodation of their job-related handicaps was a right under the union contract. And that right can be addressed only under §301.

Moreover, it is clear that the question of discriminatory motivation is not independent of the collective bargaining agreement and would require interpretation of that agreement. To determine whether Chrysler discriminated against Fleming by not affording him the same contractual rights as it would give to non-handicapped workers, the court must examine the scope of those contractual rights. But

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[5] The court indicated that it would apply the same analysis to Smolarek's claim if it were required to reach the merits of Chrysler's pre-emption "defense." Pet. App. 14a-15a & n.3.

such an inquiry would require interpretation of the express and implied rights under the collective bargaining agreement and would directly contravene the fundamental federal policies underlying §301 and this Court's long-standing pre-emption decisions. It is also clear that the claimed right to accommodation of job-related handicaps "can be waived or altered by agreement of [the] parties." *Lueck*, 471 U.S. at 213. Such rights are not independent of labor contracts and can be pursued only under §301.

The court of appeals' decision would thus allow state courts and juries to interpret the provisions of collective bargaining agreements and it would permit them to do so with reference to state rather than federal law. The decision thus substantially undermines the important federal policy requiring application of a uniform, nationwide body of law to cases dependent on the terms of union contracts. It also contravenes the federal policy favoring resolution of labor contract disputes through contractual grievance procedures culminating in final and binding arbitration. This Court should grant the petition to protect the important federal interests reflected in those policies.

B. The Court Of Appeals' Holding That Chrysler's Motivation Presented An Issue Independent From The Terms Of The Union Contract Conflicts With This Court's Decision In *Lueck* And With The Decisions Of Several Other Courts Of Appeals.

As this Court has repeatedly held, in cases like this one federal labor relations policy "mandate[s] resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes." *Lingle*, 108 S. Ct. at 1880. Consequently, the Court has required application of federal law not only when the asserted claim directly requires interpretation of a collective bargaining agreement, but also where state

claims are intertwined with contract issues and are not truly independent of those issues. *Lueck*, 471 U.S. at 210-211. When contract issues are involved, the dispute must be resolved under §301. *Ibid.*

The court of appeals in this case, by "wear[ing] blinders" (Pet. App. 23a) and ignoring the true nature of respondents' claims, has demonstrated how easily a court might misinterpret *Lingle* to permit encroachment of state law on necessarily federal issues. In *Lingle* this Court decided that the state claim was not pre-empted because it could be raised even in the absence of a collective bargaining agreement. The fact that there may have been parallel rights under the agreement did not diminish the fact that the state claim was fully independent of any contractual rights. Similarly, the Michigan Handicapper's Civil Rights Act might confer rights that are fully independent of contractual rights in other cases. But in this case, the right to accommodation sought by respondents was not independent of the union contract. In fact, it was a right that was available, if at all, *only* under the collective bargaining agreement. And the court of appeals cannot negate that fact by focusing on Chrysler's motivation.

The court of appeals reasoned that the critical question at least as to Fleming's claim was "[w]hat was Chrysler's motivation?" Pet. App. 16a.[6] Even if the right to accommodation was based solely on the collective bargaining agreement, under the court's theory it would not be necessary to interpret that contract. The court would be presented with " 'purely factual questions' relating to the conduct and motivation of the employer." *Id.*, at 15a. And those questions would be "sufficiently 'independent' of the

[6] The same reasoning would apparently apply to Smolarek's accommodation claim if the court were required to decide whether that claim was pre-empted by §301. Pet. App. 14a-15a & n.3.

collective bargaining agreement to escape §301 pre-emption." *Id.*, at 16a.

That is exactly the kind of reasoning that this Court unanimously rejected in *Allis-Chalmers Co.* v. *Lueck*. The plaintiff in *Lueck* claimed that her employer had acted in bad faith in handling her claim for disability benefits provided by the union contract. The Wisconsin Supreme Court—much like the court of appeals in this case—"held that the 'specific violation of the labor contract, if there was one, is irrelevant to the issue of whether the defendants exercised bad faith in the manner in which they handled Lueck's claim.' " 471 U.S. at 214. In this case, the court reasoned that the critical question would "relat[e] to the conduct and motivation of the employer" (Pet. App. 13a), and not to whether the contract had been violated.

This Court unanimously rejected that reasoning in *Lueck*, and the court of appeals should have followed that precedent in this case. Because the right to disability benefits—like the right to accommodation of job-related handicaps in this case—derived from the collective bargaining agreement, questions as to the employer's conduct and motivation were not sufficiently independent of the contract to avoid §301 pre-emption.

Several other courts have considered the impact of *Lueck* and *Lingle* on state law claims relating to the motivation or state of mind with which employers or unions dealt with matters derived from collective bargaining agreements. See, *e.g.*, *Jackson* v. *Southern California Gas Co.*, 881 F.2d 638, 645-646 (9th Cir. 1989); *Douglas* v. *American Information Technologies Corp.*, 877 F.2d 565, 570-573 (7th Cir. 1989); *Johnson* v. *Anheuser Busch, Inc.*, 876 F.2d 620, 624 (8th Cir. 1989); *Newberry* v. *Pacific Racing Ass'n*, 854 F.2d 1142, 1148-1150 (9th Cir. 1988); *Nash* v. *AT & T Nassau Metals*, 381 S.E.2d 206, 208-210

(S.C. 1989). All of these cases held that claims alleging that an employer's conduct was outrageous or amounted to intentional infliction of emotional distress were pre-empted by §301. The Seventh Circuit's analysis in *Douglas* (877 F.2d 571-572) is typical:

> While the "extreme and outrageous" character of certain sorts of employer conduct may be evident without reference to the terms of a collective bargaining agreement, * * * the conduct that [the plaintiff] must prove to be "extreme and outrageous" in order to assert successfully her claim concerns directly the terms and conditions of employment. * * * [S]uch matters are governed by the collective bargaining agreement.

See also *Nash* v. *AT & T Nassau Metals*, 381 S.E.2d at 209-210 ("The crux of Nash's claim for outrageous conduct stems from an allegation that [his employer] deliberately and willfully set about a course of conduct to deprive him of his benefits and terminate his employment. * * * Because [the employer's] conduct in carrying out the agreement constitutes the core of this action, we do not believe a court can interpret the possible outrageousness of [the employer's] actions without examining the collective bargaining agreement").

Similarly, in this case Chrysler's state of mind (i.e., its motivation) cannot be interpreted without examining the UAW contract. The court of appeals' conclusion that Chrysler's state of mind is an independent issue and is thus not pre-empted by §301 directly conflicts with the decisions of the Seventh, Eighth and Ninth Circuits and the South Carolina Supreme Court that claims relating to an employer's state of mind in dealing with matters ultimately grounded in a union contract are pre-empted. This Court should grant the petition to resolve that conflict and to make it clear, as it held in *Lueck*, that such questions of motivation must be resolved under §301.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 89-568

In the Supreme Court of the United States

OCTOBER TERM, 1989

CHRYSLER CORPORATION, ET AL.,
PETITIONERS

v.

STANLEY SMOLAREK AND RALPH FLEMING,
RESPONDENTS

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

A. The Fleming Case

Respondent Ralph Fleming makes the incorrect and incomprehensible assertion in his brief in opposition (at 1) that a "quirk of timing" has generated such confusion in this case as to render it *sui generis* and make review by this Court unwarranted. Fleming's brief then proceeds to distort the procedural history of the case in an apparent effort to persuade the Court that its posture is somehow so peculiar that only a remand to the district court can make sense. That simply is not so.

The Michigan Handicapper's Civil Rights Act ("HCRA"), enacted in 1977, has undergone no change in the pertinent language defining a "handicap" and prohibiting discrimination "because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position" (Pet. 2-3). This language is clear and straight-forward. The Michigan Supreme Court's 1986 decision in *Carr* v. *General Motors Corp.*, 425 Mich. 313, 389 N.W.2d 686 (1986), merely confirmed that the

Michigan Legislature did not intend to require accommodation of job-related handicaps. The Michigan Supreme Court had never interpreted the clear language of the statute to the contrary.

The suggestion in Fleming's brief (at 4) that "[d]ue to a quirk of timing" the district court "did not construe the HCRA, under the *Carr* decision" is both irrelevant and untrue. *Carr* created nothing new, but, even if it did, the district court took *Carr* into account when it granted Chrysler's motion for summary judgment *the year after Carr was decided.* The Sixth Circuit Court of Appeals also took *Carr* into account in reviewing the grant of summary judgment. There is no known rule of law or procedure, as suggested in Fleming's brief (at 5), that the examination of a complaint for preemption purposes may be conducted only by a district court, and not by an appellate court, or that the examination of the complaint must be in light of the *law* "at the time the complaint was filed."[1]

In sum, Fleming's case is procedurally ripe and appropriate for review by this Court. Removal jurisdiction is undisputed. The district court found Fleming's HCRA claim preempted by Section 301 because it sought accommodation for a job-related handicap — a right that exists, if anywhere, only in the Chrysler-UAW collective bargaining agreement (Pet. 5-6). The Sixth Circuit's 8-7 *en banc* reversal of that holding is properly before this Court, and raises an important question affecting federal labor policy meriting review by this Court.

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[1] In this regard, Fleming's brief appears to have confused the general rule that removal jurisdiction is tested by reviewing the complaint as of the time of removal. See *American Fire & Cas. Co.* v. *Finn,* 341 U.S. 6, 14 (1951); *Salem Co.* v. *Manufacturer's Co.,* 264 U.S. 182, 189 (1924); 14A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3721 at 213 & n.79 (1985). Removal jurisdiction is conceded in Fleming's case, and no issue is presented with respect thereto, in light of the district court's unappealed holding that Fleming's claims for breach of good faith and fair dealing and interference with the pursuit of his occupation were preempted by Section 301 (Pet. 6 & n.1).

B. The Smolarek Case

Respondent Stanley Smolarek's brief also seeks to divert attention from the factual allegations of his complaint (attached as an appendix to Smolarek's brief). Smolarek's actual allegations bear repeating: He alleged that his medical condition "has been unrelated or *substantially unrelated* to his ability to perform the duties of his job" (¶11); that he suffered a seizure and "was disabled following that incident for approximately two weeks" (¶¶12-13); and that Chrysler refused to return him "to his former position or *another position consistent with his medical restrictions* and has maintained [him] instead on a disability lay off indefinitely" (¶16) (emphasis added). Smolarek's complaint thus concedes that his condition may, in some respect, be "related to" his ability to perform his regular job, and also complains that Chrysler refused to give him another job consistent with his medical restrictions. In these two respects Smolarek seeks accommodation of a job-related handicap unavailable under the HCRA — available, if at all, only under the Chrysler-UAW labor contract.[2]

Smolarek makes the novel argument to this Court that, because he orally disclaimed reinstatement to another position during argument before the *en banc* court of appeals in 1989, Chrysler's removal of his complaint in 1986 should be deemed improper (brief at 3). Smolarek cites no authority for this proposition, which is directly contrary to the rule, noted above, that removability is tested by reviewing the complaint as of the time of removal. Smolarek's suggestion (*id.*) that "there has been

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[2] Even what Smolarek identifies as the "essence" of his claim, i.e., "that Chrysler refused Smolarek an opportunity to return to his former job" (Smolarek brief at 4) entails an accommodation claim exceeding the scope of the HCRA because it would require *continued* accommodation of Smolarek's medical condition.

a change in the law" concerning accommodation under the HCRA is also incorrect, for the reasons noted above.[3]

Smolarek's brief (at 7) has mischaracterized the dissenting opinion of Sixth Circuit Judge Kennedy by suggesting that it applied only to that portion of respondents' complaints that "sought reinstatement to a position other than the ones they had held" and that "the Sixth Circuit was unanimous" that Chrysler's removal was "improper to the extent that Smolarek was seeking reinstatement to his original position." To the contrary, Judge Kennedy's opinion neither joined the majority nor opined on this point, "mak[ing] no attempt to resolve this question today, since it would merely be dicta in a dissent" (Pet. App. 22a). Furthermore, Judge Kennedy went on to state that Smolarek's "floor of rights" theory, concerning reinstatement to his former position which itself required *continued* accommodation, would "impermissibly bootstrap an accommodation requirement into the HCRA" and would accordingly be preempted by Section 301 (*id.* at 25a).

Smolarek's brief (at 11-14) has misconceived this Court's decisions concerning the order and allocation of proofs in employment discrimination cases. See *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Respondents' proof of a *prima facie* case of discrimination, in the context of their claims, includes proof that Chrysler was required to accommodate job-related handicaps. Without such accommodation, respondents are not "qualified" for the positions they seek. But that accommodation requirement exists only in the collective bargaining agreement — not in the HCRA. Accordingly, the labor contract's accommodation provisions are not a "defense" to respondents' handicap discrimination claims, but are instead *essential ele-*

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[3] Smolarek could have, but did not, move to dismiss certain claims or to amend his complaint in the district court. Smolarek's complaint remains unchanged from the date it was filed.

ments of respondents' *prima facie* case.[4] Finally, Smolarek's statement (brief at 14) concerning his "pretext" claim positively establishes the interdependence between his discrimination claim and the terms of the collective bargaining agreement. To promise that he will not "quibbl[e] with Chrysler over interpretation" of the agreement cannot negate its fundamental linkage to his claim.

The Ninth Circuit's decision in *Miller* v. *AT&T Network Systems*, 850 F.2d 543 (9th Cir. 1988), is inapposite because the Oregon handicap discrimination statute affirmatively required accommodation of job-related handicaps whereas the Michigan HCRA does not. The same is true of the Nintl Circuit's analysis of a California handicap discrimination statute in *Ackerman* v. *Western Electric Co.*, 860 F.2d 1514 (9th Cir. 1988). As explained in Chrysler's petition (at 27 n.10), the employees in *Miller* and *Ackerman* were relying upon statutory rights to accommodation that were "parallel" to any accommodation rights created by the collective bargaining agreement. The opposite is true here, as the Michigan Court of Appeals has twice recently held in rejecting the Sixth Circuit's conclusion here: *Cuffe* v. *General Motors Corp.*, 180 Mich. App. 394, ____ N.W.2d ____ (1989); *Metro* v. *Ford Motor Co.*, ____ Mich. App. ____, ____ N.W.2d ____ (Aug. 25, 1989).

Smolarek's brief (at 23-25) highlights the conflict between the Sixth Circuit's decision here and the Seventh Circuit's decision in *Douglas* v. *American Information Technologies Corp.*, 877 F.2d 565 (7th Cir. 1989). While the state-law theory was labelled differently in *Douglas*, the disabled employee's claims also arose from, and required interpretation of, the collective bargaining

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[4] Contrast *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987) (NLRA preemption defense); *Franchise Tax Board of California* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) (ERISA defense). In those cases, unlike the instant claims of respondents, the "defenses" were purely affirmative in character and unrelated to the plaintiffs' *prima facie* claims. Additionally, even if Chrysler were required to articulate (not prove) a "defense" under the collective bargaining agreement, to establish "pretext" under *Burdine*, *supra*, respondents must still prove, *as part of their case*, that the collective bargaining agreement does not apply.

agreement. In addition, the Seventh Circuit specifically held that the existence of the agreement's provisions as a "defense" to the state-law claims also triggered Section 301 preemption — directly contrary to the Sixth Circuit's holding here.

C. Federal Labor Policy

Fleming's and Smolarek's briefs in opposition concede by their silence that the Sixth Circuit's opinion in this case implicates the federal labor relations policy requiring preemption of claims that are grounded in, or require interpretation of, collective bargaining agreements. As this Court admonished in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985), respondents' state-law claims, triable to juries, raise the potential for "all the evils" addressed by the Court in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 (1962): Parties to labor contracts would be "uncertain as to what they were binding themselves to," "it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate." *Lueck*, 471 U.S. at 211.

Moreover, as the seven dissenting Sixth Circuit judges cautioned, the majority's "overbroad precedent against finding §301 preemption" would "permit[ ] an individual to side-step available grievance procedures[,] * * * cause arbitration to lose most of its effectiveness, [and] eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lingle* v. *Norge Division of Magic Chef*, 486 U.S. ____, 108 S.Ct. 1877, 1884 (1988); *Lueck*, 471 U.S. at 220.

Respondent Smolarek suggests (brief at 6) that Chrysler is attempting to use the collective bargaining agreement "as an artifice to circumvent Smolarek's legislatively mandated parallel state remedies" — implying that his state-law discrimination claim stands on a special footing. This Court rejected such a notion in *Lingle*, where it made plain that state-law claims, even though involving *nonnegotiable* rights, would be preempted by

Section 301 if, "at least in certain instances," they "turned on the interpretation of a collective bargaining agreement." 108 S.Ct. at 1882 n.7. The Court further held that anti-discrimination laws actually "illustrate the relevant point for § 301 preemption analysis" — whether "the existence or the contours of the state-law violation [is] dependent upon the terms of the [labor] contract." *Lingle,* 108 S.Ct. at 1885. That test is satisfied here.

D. Conclusion

The petition for a writ of certiorari should be granted.

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November, 1989

No. 89-568

In The
Supreme Court of the United States
October Term, 1989

CHRYSLER CORPORATION, et al.,
Petitioners,

v.

STANLEY SMOLAREK and RALPH FLEMING,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND MICHIGAN MANUFACTURERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICI CURIAE

Michigan Manufacturers Association ("MMA") is a business association composed of private Michigan employers, organized and existing to study matters of general interest to its members, promote the interests of Michigan employers and of the public generally in the proper administration of laws relating to its members, and otherwise promote the general business and economic welfare of the State of Michigan. A significant aspect of MMA's activities is representing the interests of its member-employers in employment and labor relations matters before the courts, Congress, Michi-

gan Legislature, and State agencies. Michigan Manufacturers Association appears before this Court as a representative of approximately twenty-seven hundred private employers who employ one million employees covered under the Handicappers' Civil Rights Act, MCLA 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, many of whom are covered by collective bargaining agreements subject to §301 of the Labor Management Relations Act, 29 U.S.C. §185, and are affected by the issues presently before this Court. MMA is also an employer of workers in the state of Michigan and has an interest in this case both as an employer and as a representative of employers who will be affected by the issues decided herein.

National Association of Manufacturers ("NAM") is an association of approximately 13,500 companies and subsidiaries that together produce more than eighty percent of this nation's manufactured goods and employ eighty-five percent of all manufacturing workers in the United States, many of whom are potentially affected by the issues addressed herein. NAM is affiliated with 158,000 additional businesses through its association's council and the National Industrial Council. MMA and NAM represent the interests of their member-employers through various means including through appearances as *amicus curiae* in cases of major concern.

The paramount issue of federal preemption under Section 301 of the Labor Management Relations Act and the remedy it mandates are of particular concern to MMA, NAM and their members. This Court's consideration of the issue raised in these cases will have a material impact on the business and economic climate in the state of Michigan and other states which have enacted comparable handicapper legislation. The Sixth Circuit Court of Appeals' decision would allow state courts to scrutinize the propriety of specific decisions made by employers pursuant to collectively bargained agreements regarding an employee's medical restrictions and ability to work and safely perform a job. Employers will find themselves subject to judicial litigation resulting in substan-

tial monetary damages for employment actions which the parties have agreed to remedy only by resort to internal grievance and arbitration procedures. If employers are discouraged from providing for disability leaves and medical restriction accommodations in collectively bargained agreements because they are subject to inconsistent judicial and arbitral interpretations, the large majority of employees who benefit from such provisions will also suffer.

Because the Court of Appeals' decision frustrates federal labor policy and contradicts governing precedent from this Court, Michigan Manufacturers Association and National Association of Manufacturers submit this brief *amicus curiae*, with the consent of all parties, in support of the petition for a writ of certiorari in order to assist the Court in evaluating the importance of the issues presented.

PRELIMINARY STATEMENT

The question in these two cases is whether Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 ("LMRA") preempts respondents' claims of violation of Michigan's Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*, MSA §3.550(101) *et seq.* ("MHCRA"). The essence of Smolarek's and Fleming's respective claims is that Chrysler's failure to reinstate Smolarek following a disability leave, and to grant Fleming preferential work assignments to accommodate his medical restrictions, constituted "handicap discrimination." Both respondents claim that they have been denied, and now seek to enforce, rights that originate in the Chrysler/UAW collective bargaining agreement. Absent a contractual right to reinstatement, Smolarek would have no claim. Similarly, the duty to accommodate Fleming's job-related medical restrictions arises — if at all — only under the collective bargaining agreement. Respondents' claims cannot be resolved without looking to the collective bargaining agreement to ascertain their entitlement to the accommodations they seek.

In an essentially evenly divided *en banc* decision, the Sixth Circuit Court of Appeals majority determined that respondents' claims were not preempted by Section 301. The seven dissenting judges believed respondents' MHCRA claims were preempted since they arose only from the collective bargaining agreement. Petitioners argue that upon application of the standard articulated by this Court in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) and *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988), respondents' claims are "inextricably intertwined with" and "require interpretation of" a collective bargaining agreement.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD RESOLVE CONFUSION IN SECTION 301 PREEMPTION ANALYSIS BY CLARIFYING THAT ENFORCEMENT OF RIGHTS DERIVED SOLELY FROM COLLECTIVE BARGAINING AGREEMENTS REQUIRES INTERPRETATION OF SUCH AGREEMENTS.

Where the resolution of state law claims would interfere with or frustrate federal labor law policy favoring private resolution of labor disputes, such claims must yield to federal preemption. The goal of federal labor policy, as articulated in the federal statutory scheme and reflected in prior decisions of this Court, is to promote stability and industrial peace in the workplace. The rationale underlying a uniform federal labor policy was set forth by this Court almost thirty years ago:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of nego-

> tiating an agreement would be made immeasurably more difficult . . . Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

Teamsters Union v. Lucas Flour Co., 369 U.S. 95 at 103 (1962). Therefore, when an employee seeks to redress violations of rights that arise out of a collective bargaining agreement, resolution of those claims falls within the exclusive scope of Section 301 of the LMRA. *Id.*

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) this Court extended the preemptive reach of Section 301 "beyond suits alleging contract violation" to encompass state tort claims when resolution of those claims involves "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement." 471 U.S. at 211. The Court observed in *Lueck* that state-law rights and obligations that do not exist independently of private agreements are preempted by those agreements. Emphasizing that the right asserted by the plaintiff in *Lueck* (timely payment of disability insurance benefits) derived from the contract, the Court explained:

> [U]nless federal law governs that claim, the meaning of the health and disability benefit provisions of the labor agreement will be subject to varying interpretations, and the congressional goal of a unified federal body of labor-contract law would be subverted. 471 U.S. at 220.

The Court held that the employee's state-law tort claim was preempted by Section 301 because "any attempt to assess liability here inevitably will involve contract interpretation." 471 U.S. at 218. The Court then articulated a standard imposing preemption by Section 301 "when resolution of a state-

law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.*

Last year this Court further clarified the contours of Section 301 preemption in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988). The Court first recounted the basis of its previous finding of preemption in *Lueck* — that the collective bargaining agreement was the source of the right that the employee sought to enforce:

> We began by examining the collective bargaining agreement and determined that it provided the basis not only for the benefits, but also for the *right* to have payments made in a timely manner, *Id.* at 213–216, 105 S.Ct. at 1912–1914. We then analyzed the Wisconsin tort remedy, explaining that it "exists for a breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, *crucially, is 'ascertained from a consideration of the contract itself.'* " *(Emphasis added) Lingle*, 108 S.Ct. at 1881.

Lingle essentially reiterated the standard imposed by *Lueck*: that "judges can determine questions of state law involving labor management relations only if such questions do not require construing collective bargaining agreements." 108 S. Ct. at 1884. In *Lingle* itself, however, the plaintiff's claim of retaliatory discharge for filing a workers compensation claim was not preempted by Section 301, because the essential elements that the plaintiff needed to show (that she was discharged and that her employer discharged her because she filed a workers compensation claim) did not necessitate the interpretation of any term of a collective bargaining agreement. Significantly, a court was not required in the *Lingle* scenario to examine the collective bargaining agreement to see whether the employee had the right to file a workers compensation claim. Unlike Lueck's right to receive timely insurance payments, the right to file a workers compensa-

tion claim derives solely from state statutes. Thus, the state law remedy the plaintiff sought in *Lingle* was "independent" of the collective bargaining agreement for Section 301 pre-emption purposes. 108 S. Ct. at 1882.

The initial inquiry in each of the present cases must be the same as the initial inquiry in *Lueck:* whether the right that the employee is seeking to exercise or enforce would exist in the absence of the collective bargaining agreement. If the respondents' state law claims are rooted in "independent" rights and can be identified without examining the collective bargaining agreement, then they will not be preempted. However, if the rights that are at the core of respondents' claims are derived from, and therefore dependent upon, the collective bargaining agreement, then they must be preempted. In accordance with *Lueck*, this inquiry must be the starting point in Section 301 preemption analysis. It should not be bypassed even where a plaintiff alleges that his employer's motivation was discriminatory.

As this Court acknowleged in *Lueck* four years ago, the scope of "the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis." 471 U.S. at 220. However, ever since the Court cautioned in *Lueck* that not every state law claim that "relates in some way" to a collectively bargained provision is necessarily pre-empted, the lower courts and counsel have received limited guidance in applying this doctrine. The present controversy presents a particularly appropriate opportunity for this Court to address at least one aspect of the practical application of the "interpretation" requirement. This Court should review these cases to emphasize that when a court must examine a collective bargaining agreement in order to ascertain the employee's entitlement to the benefit or treatment he seeks, such examination constitutes "interpretation" as contemplated by *Lueck* and *Lingle*.

II.

THE SIXTH CIRCUIT IGNORED THE SIGNIFICANT DISTINCTION BETWEEN CASES IN WHICH A COLLECTIVE BARGAINING AGREEMENT IS THE SOURCE OF THE RIGHT THE EMPLOYEE SEEKS TO ENFORCE AND THOSE IN WHICH IT IS A DEFENSE TO AN EMPLOYEE'S ACTION.

Michigan's Handicappers' Civil Rights Act provides that an employer may not "[d]ischarge or otherwise discriminate against an individual with respect to . . . the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(b); MSA § 3.550(202)(1)(b). MHCRA does not require an employer to accommodate a physical condition which is related to an employee's ability to perform his job. *Carr v. General Motors*, 425 Mich. 313; 389 N.W.2d 686 (1986). As construed in *Carr* and its progeny, MHCRA imposes no obligation on employers to provide disability leave for an employee who becomes temporarily disabled, or to reinstate an employee to a job consistent with his medical restrictions.[1]

Respondents contend that their claims under MHCRA allege "non-negotiable" state law rights that are "independent" of

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[1] Since *Lingle* was decided last year, the Michigan Court of Appeals has consistently held that where plaintiffs' claims under MHCRA seek to enforce reinstatement and seniority rights that derive from a collective bargaining agreement, such claims require interpretation of that agreement and are preempted by Section 301. *Cuffe v. General Motors Corp.*, 166 Mich.App. 766, 420 N.W.2d 874 (1988); *Metro v. Ford Motor Company*, 169 Mich. App. 549, 426 N.W.2d 700 (1988); *Desjardins v. The Budd Company*, 175 Mich.App. 599, 438 N.W.2d 622 (1988). The Michigan Supreme Court vacated the Court of Appeals' decisions in *Metro* and *Cuffe* and remanded them for reconsideration in light of *Lingle*. The Court of Appeals has since reaffirmed its decisions in both *Metro*, ___ N.W.2d ___ (Mich. App., August 25, 1989) and *Cuffe*, ___ NW2d ___ (Mich. App., October 2, 1989).

the terms of the collective bargaining agreement. In upholding the viability of respondents' claims, the Court of Appeals disregarded the contractual rights upon which respondents must rely to seek accommodation for medical conditions related to their abilities to perform particular jobs. The duty claimed to have been breached in these cases is not simply the duty not to discriminate, but the duty to reinstate and accommodate respondents in their original or different jobs. That duty arises from the collective bargaining agreement, not from MHCRA.[2]

The Sixth Circuit majority acknowledged that the UAW/Chrysler collective bargaining agreement contains provisions for reinstatement following disability and reassignment to accommodate medical restrictions. It suggested, in fact, that Chrysler may ultimately defend its position on the basis of contractual limitations, as for example where the majority stated: "Chrysler may, in its own defense, assert that its treatment of Smolarek was allowed or required by the terms of the collective bargaining agreement and therefore was not based on Smolarek's handicap." Slip Opinion at 13. The significance of the collective bargaining agreement in these cases, however, is not simply that it provides a rationale or a defense for Chrysler's actions, but that it is the sole source of the accommodations that Fleming and Smolarek seek.

This distinction is readily apparent when the claims in these cases are compared with the plaintiff's claims in a recent Sixth Circuit Court of Appeals decision, *O'Shea v. The Detroit News*, ___ F.2d ___, 1989 WL 118791 (October 11, 1989), which purports to rely on the majority's analysis in *Smolarek*. The plaintiff in *O'Shea* claimed that the acts of her

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[2] Although it may be that MHCRA bestows certain non-negotiable rights upon both unionized and non-unionized workers, the existence of such non-negotiable rights does not ensure non-preemption. Even where a law applies to all state workers, in those instances where interpretation of a collective bargaining agreement is required, the application of the law in those instances is preempted. *Lingle*, 108 S.Ct. at 1882, n.7.

late husband's employer in transferring him to the newspaper's midnight shift constituted not only a demotion, but age and handicap discrimination. The employer argued that it transferred Mr. O'Shea pursuant to provisions in its collective bargaining agreement and that interpretation of that agreement was required to determine whether it had, in fact, demoted Mr.O'Shea. The Court of Appeals, invoking the example of *Lingle*, explained:

> The defendant can argue in defense that he had good cause under the contract, but this defense does not affect the fact that the *plaintiff's claim is not based on the contract*. The claim thus does not depend on any interpretation of the agreement; the relevant rights are completely outside the agreement. (Emphasis added) Slip opinion at 6.

Referring to its decision on Smolarek's and Fleming's claims, the Court of Appeals recalled: "We held [there] that the question whether or not the plaintiff was discriminated against was separate from any possible defense the employer might have under the contract." *O'Shea* at 7. The Court of Appeals' characterization of its own prior decision reflects the confusion that has developed in this area. The Court of Appeals' application of Section 301 preemption in these cases ignores basic differences between those situations where the employee's claim is based on the contract and where the employer's defense is based on the contract. Certiorari should be granted to address this fundamental distinction and resolve the inconsistencies faced by employees and employers as a result of this confusion.

III.

PERMITTING EMPLOYEES TO SIDESTEP NEGOTIATED GRIEVANCE PROCEDURES FRUSTRATES THE GRIEVANCE/ARBITRATION PROCESS, AND FORCES EMPLOYERS TO ACCOMMODATE EMPLOYEES WHOM THEY DID NOT AGREE TO ACCOMMODATE.

MHCRA expressly recognizes that a person's physical condition is a relevant consideration in employment decisions, so long as it is job related. *Carr, supra.* In this regard, MHCRA fundamentally differs from civil rights statutes that prohibit consideration of such characteristics as race, sex, age or national origin.[3] It is not unlawful *per se* to consider physical disabilities and medical restrictions in making employment decisions. Physical conditions, unlike sex, age or race, can and must be considered in making employment decisions, so long as the physical conditions are job related.[4] Thus, under MHCRA, it is not only appropriate, but generally accepted for employers and unions to negotiate provisions for medical restrictions, disability and reinstatement. The Chrysler/UAW collective bargaining agreement contains detailed negotiated provisions for determining disabilities and medical restrictions (generally by independent medical examinations), procedures

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[3] The Sixth Circuit majority relies on this Court's suggestion in *Lingle*, as implemented by the Ninth Circuit in *Ackerman v. Western Electric Co.*, 860 F.2d 1514 (9th Cir. 1988), that "the mere fact that a broad contractual protection against discriminatory . . . discharge may provide a remedy for conduct that coincidentally violates state law does not make the existence or the contours of the state law violation dependent upon the terms of the private contract." However, the contractual provisions at issue in these cases are not "broad contractual provisions" which simply prohibit discrimination in employment decisions. To resolve the asserted claims, a court must first construe the UAW/Chrysler contract provisions that enable employees to take a disability leave and to resume employment depending upon seniority, availability and physical restrictions.

[4] See, for example, *McCall v. Chesapeake & Ohio Railway Company*, 844 F.2d 294 (6th Cir. 1988), cert. denied, 109 S.Ct. 196 (1988).

for reinstatement following a disability and assignment to jobs that can be performed under certain medical restrictions. Decisions made pursuant to these negotiated provisions are subject to contractual grievance/arbitration procedures. Certainly it was intended by the contracting parties that disputes relative to such decisions would be resolved through those procedures.

It is well established that state law claims cannot serve as an independent source of private rights to enforce collective bargaining agreements which themselves provide for remedies through grievance procedures. *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). Nonetheless, respondents' claims seek to circumvent collectively bargained procedures for making decisions regarding job-related physical conditions, decisions that do not conflict with MHCRA.

If a state law action were permitted each time an individual employee objected to the result of the contractual grievance mechanism — or failed to invoke the contractual mechanism — such state actions would circumvent the very procedures agreed to by the union and the employer and would invariably undermine the collective bargaining process in areas that are appropriate subjects of bargaining even under MHCRA.

This Court in *Lueck* emphasized the danger inherent in such a result when it stated:

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653, 13 L.Ed.2d 580, 85 S.Ct. 614, 616 (1965), as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance. 471 U.S. at 220.

IV.

CONCLUSION

For these reasons, and upon the entire record, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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